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Now that *The Modern Law Review* appears six times a year, the Editorial Committee have felt free to test a proposal they have long had under consideration—the publication of an issue devoted to a single branch of law.

This, the first such special number, concentrates attention on the criminal law and its attendant problems. If, as is hoped, this experiment meets with the approval of readers, the Committee will adopt the regular practice of publishing, not more than once a year, further special issues in which particular topics are examined at greater length than can ordinarily be possible. The Editorial Committee will welcome the views of readers upon this experiment.

THE CRIMINAL DEGREES OF KNOWLEDGE*

To establish criminal guilt it is often necessary to consider what degree of knowledge is sufficient to incur liability. In two branches of criminal law, namely, statutory offences involving knowledge and aiding and abetting, this question is of such practical importance that it is surprising to find little or no treatment of the subject in any of the standard works.[1] How very different this is compared with the attention given, for example, to the doctrines of constructive notice and connivance in books on equity and divorce respectively. Indeed, the kinship which exists on this topic between the field of equity and criminal law is one of the interesting features made apparent by a closer study of the problem. In the recent case of *Roper* v. *Taylor's Central Garages (Exeter) Ltd.*,[2] an attempt was made by Devlin J. to categorise the various degrees of knowledge which are relevant in statutory crimes, but it is respectfully suggested that his conclusions must be treated with reserve, since, with one exception, they were put forward without any apparent citation or examination of the relevant cases. So far as the requisite grades of knowledge in aiding and abetting are concerned there have also been several recent cases [3] in which the courts have sought to re-enunciate the correct principles. In both spheres of liability the principal doubt concerns negligence as a state of mind. Whereas on a charge of aiding and abetting it is reasonably clear that nothing less than actual knowledge or connivance is required,[4] the examination which follows discloses

* This article constitutes a chapter of a book which is shortly to be published in the series *English Studies in Criminal Science*, edited by the Department of Criminal Science, Cambridge University.

1 A notable exception is Glanville Williams's recently published *Criminal Law—The General Part*. See pp. 59–60, 85–8, 125–7.

2 [1951] 2 T.L.R. 284, at pp. 287–8.

3 See *Johnson* v. *Youden* [1950] 1 All E.R. 300; *Ferguson* v. *Weaving* [1951] 1 K.B. 814, and *Gardner* v. *Akeroyd* [1952] 2 All E.R. 306.

4 In *Thomas* v. *Lindop* [1950] 1 All E.R. 966, Lord Goddard C.J. drew attention to the close relationship which exists between aiding and abetting and the type of offence which is based on guilty knowledge in the form of permitting or suffering certain conduct. Just as actual knowledge or connivance is necessary in cases of suffering, so, too, the Chief Justice added, it is one of the essential ingredients of aiding and abetting (see p. 968). Some of the cases on aiding and abetting in which the doctrine of connivance was applied are *R.* v. *Antonelli and Barberi* (1905) 70 J.P. 4 and *Johnson* v. *Youden* (*supra*). The decision in the last case should be compared with that in *Carter* v. *Mace* [1949] 2 All E.R. 714, in which the Divisional Court appear to lay down a principle wherein liability as an aider and abettor arises independently of knowledge or connivance. The suggestion made by a learned writer in 66 L.Q.R. at p. 228, that *Carter* v. *Mace* is explicable as deciding that a person may be liable for aiding and abetting if he fails to carry out such inquiries as a reasonable man

the significant fact that, although no actual decision exists, there is an impressive body of dicta which suggests that even negligence will suffice in a large number of statutory offences involving guilty knowledge.[5]

A glance at the avalanche of new offences created during the past decade by statute and regulation reveals the frequent resort by the legislature to such epithets as "knowingly," "permitting," "allowing," and "suffering," or such double-barrelled expressions as "knowingly suffers," "knowingly permits," or "wilfully suffers or permits." Space does not permit a full analysis of the cases in which one or other of these words or phrases has been the subject of interpretation by the courts, but it can be said with confidence that the general consensus of judicial opinion deems it necessary in such cases for *mens rea*, in the form of knowledge of all the elements constituting the prohibited act or conduct, to be proved.[6] There is far less unanimity, however, on the subsidiary question : What alternative degrees of knowledge must be proved by the prosecution in order to establish the requisite *mens rea*? In all, three states of mind must be considered, but it is difficult to give them firm individual descriptions since they have sometimes been used interchangeably, thus introducing an additional element of confusion.

Actual or Direct Knowledge

Foremost among the culpable states of mind is actual or direct knowledge of the forbidden act. Invariably, however, as Devlin J. pointed out in *Roper* v. *Taylor's Central Garages*, it is impossible to prove the state of another man's mind [7] with the result that the defendant's knowledge is generally inferred from the nature of the act done.[8] There is, of course, nothing new in this doctrine

would make, is, in effect, tantamount to saying that negligence will suffice. This doctrine was rejected in *Callow* v. *Tillstone* (1900) 83 L.T. 411, and in *Benford* v. *Sims* [1898] 2 Q.B. 641.

[5] Contrast the statement by Glanville Williams in (1953) 16 M.L.R. 231, in which he writes that, hitherto, English courts have made little use of the concept of criminal negligence: "A statute absolute in its terms is construed either as impliedly requiring *mens rea* (*i.e.*, intention or subjective recklessness), or else as not requiring any fault. . . . Courts have not taken the middle course of construing the statute as aimed against negligence." See, too, Hall, *General Principles of Criminal Law*, p. 235, and the same writer in a recent article "Revision of Criminal Law: Objectives and Methods" (1954) 33 *Nebraska L. R.*, pp. 3–15, at p. 6.

[6] As befits a strong advocate of the doctrine of *mens rea*, Lord Goddard C.J., in *Ferguson* v. *Weaving* [1951] 1 K.B. 814, 820, stressed the difference between an absolute prohibition and a prohibition against permitting or suffering, in which knowledge is necessary to constitute the offence. Failure to grasp this essential distinction, it is respectfully suggested, leads Mr. J. W. C. Turner in his new edition of Kenny, pp. 38 and 42, to include within the class of crimes for which liability is absolute such offences as permitting drunkenness, knowingly permitting prostitutes to meet on licensed premises, and suffering gaming.

[7] *Cf.* Bowen L.J. in *Angus* v. *Clifford* [1891] 2 Ch. 449, at p. 471, and Glanville Williams, *Criminal Law*, pp. 79–80.

[8] [1951] 2 T.L.R. at p. 288.

which is sometimes expressed in the time-honoured maxim that a man is taken to intend the natural consequences of his own conduct.[9] Its application in the realm of *mens rea* was well explained in *Lee* v. *Taylor and Gill* by Channell J. who said [10]: "In all cases where it is necessary to prove anything which depends upon the state of a man's mind, whether it is malice, whether it is intent, whether it is knowledge, whether it is suffering or conniving, which all depend upon what is in the man's mind, in any of those cases the way in which it certainly may be and generally must be proved is by inferring it from other facts."

Opinion is divided as to whether the presumption expressed in the above maxim is one of law or fact,[11] but this would seem to be of less importance than the realisation that the inference is not necessarily conclusive. Generally, it takes the prosecution only part of the way towards establishing the particular intent or knowledge—failure on the part of the accused to provide any explanation of his conduct will, of course, provide the final push but if the defendant calls contrary evidence he may defeat the inference which would otherwise be drawn. Where the offence is one of absolute prohibition and *mens rea*, in the sense of foresight of consequences, is excluded, the mere intentional doing of the forbidden act is sufficient to render the accused liable. All that must be shown is that the *actus reus*, which in itself constitutes the offence, resulted from a voluntary act on the part of the prisoner, and in such cases it is obvious that the maxim has no application.

Bearing in mind, then, the boundaries of the doctrine of natural consequences it is with surprise that we read the words of Lord Goddard C.J., in *Reynolds* v. *G. H. Austin & Co., Ltd.*,[12] that "except in cases where the statute creates an offence of knowingly doing an act the prosecution can establish a prima facie case merely by proving the act was done." No authority was given for this so-called exception to the general rule and, assuming for the moment that the exception exists, it was ignored by the Lord Chief Justice himself in *R.* v. *Cohen*,[13] decided only a few months earlier. That case, which provides a good illustration of the commonly accepted mode of proving actual knowledge, involved a charge of knowingly

[9] For the recent discussion of this maxim, see *R.* v. *Steane* [1947] 1 K.B. at pp. 1004, 1006; *Hosegood* v. *Hosegood* (1950) 66 T.L.R. 735, at p. 738; *Kaslefsky* v. *Kaslefsky* [1951] P. 38, at p. 46; *Sinnasamy* v. *The King* [1951] A.C. 83, at p. 87, and note in 67 L.Q.R. 283; *Sayce* v. *Coupe* [1952] 2 All E.R. at p. 717, and Glanville Williams, *Criminal Law*, pp. 77–81, 705–6.

[10] (1912) 77 J.P. 66, at p. 69.

[11] Compare, for example, the views of Denning L.J. in *Hosegood* v. *Hosegood* (*supra*), at p. 738, and those of Lord Merriman P. in *Simpson* v. *Simpson* [1951] 1 All E.R. at pp. 961–2. For some pungent remarks on the application of this presumption, see the judgment of Jackson J. in *Morissette* v. *United States* (1952) 342 U.S. 246, at pp. 273–6.

[12] [1951] 2 K.B. 135, at p. 145.

[13] [1951] 1 K.B. 505.

harbouring uncustomed goods contrary to the Customs Consolidation Act, 1876, s. 186. Indicating what has to be proved in order to establish a prima facie case, Lord Goddard said [14]: "Apart from an intent to defraud . . . the offence consists in knowingly harbouring uncustomed goods. . . . To prove a conscious harbouring it would usually be enough to show that the goods which were subject to duty were found in the possession of the accused. If they are found in his house, warehouse or other place under his control, that would establish a prima facie case that he knowingly harboured them, though, no doubt, he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had dumped them there without his knowledge or privity." How is one to reconcile the two opinions of Lord Goddard C.J. except to say that the above model direction to the jury must have slipped his memory in the later case?

The same principle is seen operating in cases of receiving stolen goods in which guilty knowledge must be shown to exist at the time of receipt. In the "very hard-worked and very often misunderstood" [15] case of *R.* v. *Schama and Abramovitch*, Lord Reading C.J. explained the position by saying [16]: "Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen but . . . if the prisoner gives an explanation which raises a doubt in the minds of the jury whether or not he knew . . . he is entitled to be acquitted." Despite the clarity of this passage, appeals against conviction for receiving on the ground of misdirection continue to be made successfully. In *R.* v. *Garth*,[17] and again in *R.* v. *Aves*,[18] the Court of Criminal Appeal, not without a discernible taint of tartness provoked by the difficulty experienced by certain learned recorders in explaining the law correctly to juries, has had to re-enunciate the application of the principle laid down in *Abramovitch's Case*. Events being of such an infinitely varied character, it is obviously difficult to lay down in advance what constitutes suspicious circumstances, but a good test, advanced by Kenny,[19] of what would suffice to infer guilty knowledge was the offering of goods by an unlikely vendor for an unlikely price at an unlikely hour. Not content with the above presumption, the legislature has provided additional facilities which frequently assist the prosecution in proving guilty

14 *Ibid.*, at pp. 506–7. There is an obvious mistake on p. 506, which reads "Apart from an *attempt* to defraud . . ."
15 [1946] W.N. at p. 102.
16 (1914) 11 Cr.App.R. 45, at p. 49.
17 [1949] 1 All E.R. 773.
18 [1950] 2 All E.R. 330.
19 *Outlines of Criminal Law* (16th ed. by J. W. C. Turner), p. 291.

knowledge,[20] but as these provisions are of limited application and sufficiently well known, they do not merit further attention.

Connivance or Knowledge of the Second Degree

For well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offence based on such words as "permitting," "allowing," "suffering" and "knowingly." This state of mind has generally been described as connivance or constructive knowledge, and approximates closely to the conception of recklessness. Disregarding the hackneyed term "connivance," Devlin J. in *Roper* v. *Taylor's Central Garages* coined the new phrase "knowledge of the second degree."[21] In the ensuing discussion, however, the term connivance will be used as best calculated to describe the second sort of knowledge which carries with it criminal liability.

So far as can be discovered, the case of *R.* v. *Sleep*[22] was the first occasion in which judicial approval[23] was given to the notion that some lesser degree of knowledge than actual knowledge would suffice to establish *mens rea*. The accused in that case was charged with having been found in possession of naval stores marked with the broad arrow,[24] into which offence the court inserted the word "knowingly." In two earlier cases, *R.* v. *Wilmett*[25] and *R.* v. *Cohen*,[26] actual knowledge had been required but in *R.* v. *Sleep*, Willes J., delivering judgment quashing the conviction, said[27]: ". . . the jury have not found that the prisoner either knew that the goods were government stores or wilfully shut his eyes to the fact." This suggests that if evidence had been forthcoming showing

[20] Larceny Act, 1916, s. 43 (1). For a recent application of these provisions, see *R.* v. *Davies* [1953] 1 All E.R. 341, where the C.C.A. ruled that where there are counts for stealing and receiving and the charge is substantially one of stealing, the statutory evidence under s. 43 (1) ought not to be given.

[21] [1951] 2 T.L.R. at p. 288.

[22] (1861) 30 L.J.M.C. 170. It is interesting to compare the following definition of "conniving" put forward, a few years later, by Lord Westbury L.C. in *Gipps* v. *Gipps and Hume* (1864) 11 H.L.C. 1, an action for divorce: "The word 'conniving' is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur." See, too, the definition advanced by Sir Cresswell Cresswell in *Glennie* v. *Glennie* (1862) 32 L.J.P.M. & A. 17, 20.

[23] Yet, a year earlier, the Criminal Lunatic Asylum Act, 1860, s. 12, made it an offence to permit any person therein confined to escape through wilful neglect or connivance.

[24] An offence under the Embezzlement of Public Stores Act, 1697 (9 Will. 3, c. 41), s. 2.

[25] (1848) 3 Cox C.C. 281.

[26] (1858) 8 Cox C.C. 41.

[27] (1861) 30 L.J.M.C. 170, at p. 174.

that the accused had wilfully shut his eyes to the marking on the stores the case might have been decided differently.

Another fourteen years were to elapse before the lead given by Willes J. was followed.[28] In *Bosley* v. *Davies*,[29] a hotel-keeper was charged under the Licensing Act, 1872, s. 17,[30] with suffering gaming to be carried on in licensed premises. The card-players, who were in a private room, corroborated the licensee's story that not only did they not have the cards of her but she was quite unaware of what was going on. To the licensee's plea that, to support a conviction under section 17, actual knowledge must be shown, the Divisional Court, consisting of Cockburn C.J., Mellor and Quain JJ., answered that "actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on."[31] Time after time in subsequent cases it will be found that the knowledge or connivance of a servant is attributed to his employer, the governing principle being that the doctrine of vicarious liability applies only in cases where the employer has delegated control and responsibility for the premises to the servant.[32]

The evolution in criminal law of the doctrine of vicarious liability, which originated a little over a century ago, is outside the scope of the present article. However, in considering the development of connivance as a culpable state of mind it is necessary to turn to two cases, decided towards the end of the last century, in which the principle of vicarious liability is seen entangling itself around the application of connivance. The first of these cases is *Redgate* v. *Haynes*[33] which, though bearing a close resemblance to *Bosley* v. *Davies* in that the same offence was involved and the circumstances were similar, is distinguishable by the significant fact that the hall-porter, whose duty it was to attend upon customers, retired after closing-time to his own chair in a parlour beyond the bar, at the extreme end of the house. Not unnaturally, the justices drew the conclusion that the porter suspected what was going on and connived at it. The Divisional Court held that the evidence justified the conviction, Blackburn J. putting forward two alternative grounds upon which a licensee

28 In *Avards* v. *Dance* (1862) 26 J.P. 437, owing to the strong stand taken by Wightman J. that there was not enough evidence to support a conviction for "knowingly suffering gaming" (Licensing Act, 1828, s. 13), Blackburn and Crompton JJ. (see p. 438), who seemed prepared to approve the principle of connivance, did not press their views and the conviction was quashed.

29 (1875) L.R. 1 Q.B. 84.

30 Re-enacted in the Licensing Act, 1953 (1 & 2 Eliz. 2, c. 46), s. 141 (1). Compare the same offence in the Licensing Act, 1828 (9 Geo. 4, c. 61), s. 13, in which the words "knowingly suffers" were used.

31 *Ibid.*, at p. 88.

32 See *Allen* v. *Whitehead* [1930] 1 K.B. 211; *Linnett* v. *Commr. of Metrop. Police* [1946] K.B. 290, at p. 294; *Ferguson* v. *Weaving* [1951] 1 K.B. 814, at p. 821; *Quality Dairies (York), Ltd.* v. *Pedley* [1952] 1 K.B. 275, at p. 279.

33 (1876) L.R. 1 Q.B. 89.

might be held liable for suffering gaming. First, the learned judge said, if the licensee " purposely abstained from ascertaining whether gaming was going on or not, in other words, connived at it " he commits the offence; and secondly, if the licensee goes to bed leaving a servant " in charge of the house " who connived at the gaming, the licensee is also answerable for the conduct of such servant.[34] Succinctly Lush J. agreed that " it is not necessary that actual knowledge of the gaming should be proved. I think that connivance on the part of the landlady or the person in charge would be quite sufficient." [35]

A few years later, in *Somerset* v. *Hart*,[36] a differently constituted court appears at first sight to have gone awry in requiring proof of connivance on the part of the landlord *himself* in order to justify a conviction. Once again the charge was suffering gaming and this time it appeared that the servant, a potman, who took and delivered customers' orders, knew that gaming was going on in a private room but took no steps to prevent it or to inform the licensee, who had no actual knowledge of the gaming. It was a market day, trade was brisk and the licensee was engaged in the bar attending to his customers. On the ground that the magistrates had acquitted the landlord of any connivance or wilful blindness the court affirmed their decision. The apparent departure from the principle enunciated in *Redgate* v. *Haynes* arose in the course of Lord Coleridge C.J.'s judgment when, after referring to the earlier cases, he declared [37]: ". . . it appears to me, in all of them the judges say that there must be something from which connivance on the part of the licensed victualler may be inferred, at all events to necessitate a conviction. It is nowhere held in those cases that he can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and there is no connivance on his part." With this view Cave J. concurred, but a quick glance back at the words of Cockburn C.J. in *Bosley* v. *Davies*, and of Lush J. in *Redgate* v. *Haynes* will indicate the discrepancy between the principles laid down in those cases and Lord Coleridge's interpretation of them in *Somerset* v. *Hart*.

As was to be expected, when the opportunity presented itself in *Bond* v. *Evans* [38] for reconsidering all the authorities on knowledge and connivance, Manisty J., adverting to the case of *Somerset*

[34] *Ibid.*, at p. 94.
[35] *Ibid.*, at p. 96.
[36] (1884) 12 Q.B.D. 360.
[37] *Ibid.*, at p. 364.
[38] (1888) 21 Q.B.D. 249. In the sixteenth edition of Kenny, *Outlines of Criminal Law*, p. 37, Mr. J. W. C. Turner treats this case as deciding that the offence of suffering gaming (he mistakenly describes it as permitting gaming, but this is of little consequence) is one of absolute liability, citing Stephen J. in support. Certainly Manisty J. expressed himself in favour of such a construction, relying on the earlier cases, *Bosley* v. *Davies* (1875) and *Redgate* v. *Haynes* (1876), but, in fact, in both cases either actual knowledge or connivance was considered

v. *Hart*, said that he could not reconcile the statements in Lord Coleridge's judgment with the previous decisions, and added that in so far as that case militated against the other authorities he preferred to adhere to the earlier cases.[39] Stephen J., on the other hand, ignored the conflict of principle and preferred to explain the decision in *Somerset* v. *Hart* as resting on the absence of any delegation of authority to the potman who was not, at the relevant time, in charge of the premises.[40] So understood, the case is not in conflict with the previous authorities and the odd fact is that this distinction was appreciated by both Lord Coleridge C.J. and Cave J. in the course of the preliminary argument.[41] It is all the more unfortunate, therefore, that when delivering judgment in *Somerset* v. *Hart* the Lord Chief Justice should have allowed himself to be led astray from the proper principles.

Leaving aside then the doctrine of vicarious liability, it will be seen that by the turn of the century the concept of connivance or wilful blindness had become firmly embedded in the minds of the judges as an alternative to actual knowledge. In *Elliott* v. *Osborne*,[42] where the appellant had been charged with cruelly ill-treating and torturing a bullock by neglecting to loosen the head rope by which it had been tethered during its passage across the Atlantic, the conviction was quashed because the appellant neither knew nor " wilfully abstained from knowing the condition of the bullock nor shut his eyes to the fact, which . . . would be sufficient evidence that he did know of the animal's condition." The same result was forthcoming in *Emary* v. *Nolloth*,[43] and in *Conlon* v. *Muldowney*,[44] both of which cases arose under the Intoxicating Liquors (Sale to Children) Act, 1901, s. 2, which prohibits a licensee from knowingly selling liquor to a child under fourteen years. In neither case was there any delegation of authority and, consequently, in the absence of " any knowledge, actual or constructive, or any wilful connivance " by the licensee, the charge was not established.

Despite this wealth of authority, and although satisfied that the licensee and his servants had ample opportunity of becoming aware that the public bar was used for betting purposes, the magistrate in *Lee* v. *Taylor and Gill*[45] dismissed the information which charged the licensee with suffering gaming. Criticising this finding

essential for a conviction. A careful study of Stephen J.'s judgment reveals that the passage cited in Kenny does not correctly represent that judge's view, which rightly interpreted the earlier cases as deciding that " the prohibition is not quite absolute, but is subject to this limitation: that in order to justify a conviction someone must know of or connive at the gaming " (p. 256).

39 *Ibid.*, at p. 255.
40 *Ibid.*, at p. 256.
41 (1884) 12 Q.B.D. 360, at p. 362.
42 (1891) 65 L.T. 378.
43 [1903] 2 K.B. 264.
44 [1904] 2 Ir.R. 498.
45 (1912) 77 J.P. 66.

Lord Alverstone C.J. declared[46]: ". . . the magistrate in dismissing this case has not given effect to his finding that these people who ought to have known were shutting their eyes to what they ought to have known and were thereby conniving at what was going on." Proceeding Lord Alverstone thought that "conniving" is really a better word than "knowledge" for the purpose of dealing with these cases, since whereas it is quite easy for a man to say he did not know, it is not so easy for him to say "I ought not to have known" if there is evidence of frequent and regular acts in which he himself took part. Channell J. and Avory J. agreed that the case should be remitted to the magistrate with a direction to consider whether the licensee had connived at the betting, and that if he answered this question in the affirmative the licensee should be convicted.

Thereafter, up to the present day, no real doubt has been cast on the proposition that connivance is as culpable as actual knowledge. We have already seen the diverse fashions in which this state of mind has been defined, ranging from the original expression "wilful shutting of the eyes" and its closest counterpart "wilful blindness," to the less forceful but equally satisfactory formulae "purposely abstaining from ascertaining" and "wilfully abstaining from knowing." The remarkable facility of judges to formulate still more phrases defining the doctrine of connivance is exemplified in the case of *Evans* v. *Dell*.[47] The respondent in that case was charged under the Road Traffic Act, 1930, s. 72 (1) (10) with permitting a twenty-seater motor-coach to be used as an express carriage,[48] otherwise than under a road service licence. It is permissible, under the Act, to use an "express carriage" without a licence but only on "a special occasion," to fall within which proviso certain conditions have to be fulfilled including one which requires the journey to be made without previous advertisement to the public. The bus proprietor did not concern himself with the arrangements made by the organisers of the trip, and had no knowledge of a newspaper advertisement in which an announcement of the coach trip appeared. According to the traffic commissioners there was a duty on the proprietor to inquire whether there had been any Press advertisement, but Lord Hewart C.J. rightly explained the law when he declared[49]: "It is said that, on those facts, the inference, not only may, but must, be drawn that the respondent deliberately refrained from making inquiries, the results of which he might not care to have. I think that is putting the matter too high."

This statement is in accord with the view expressed by Lord Goddard C.J. in *R.* v. *Garth*[50] and in *R.* v. *Cohen*,[51] and by Lord

[46] *Ibid.*, at p. 69.
[47] [1937] 1 All E.R. 349.
[48] Defined in s. 61 (1) (*b*).
[49] *Ibid.*, at p. 353.
[50] [1949] 1 All E.R. at p. 774.
[51] [1951] 1 K.B. 505, at p. 507.

Reading C.J. in *R.* v. *Abramovitch*,[52] namely, that the conduct of the accused in such cases, where knowledge is an essential ingredient of the offence, constitutes prima facie evidence only upon which a jury is entitled, but not bound, to find a verdict of guilty. Earlier in *Evans* v. *Dell*, Lord Hewart C.J. had laid down that, as a guiding rule, "in circumstances in which the owner of the vehicle is put upon inquiry, if he refrains from making the inquiry . . . the fair inference may be that he permitted the offence to be committed."[53] Insomuch as the other members of the court were agreed, as Goddard C.J. put it,[54] that there was nothing "which suggests either that he did know or that he shut his eyes to the obvious" the appeal against dismissal of the information was disallowed.

In several recent cases it will be found that the tests propounded by Lord Hewart C.J. and Goddard J. in *Evans* v. *Dell* have gained favour, and have been used repeatedly to describe this second degree of knowledge. Thus, in *Roper* v. *Taylor's Central Garages*, which arose under the same section of the Road Traffic Act, 1930, Devlin J. in defining what he described as "knowledge of the second degree" adopted the phrase "deliberately refraining from making inquiries the results of which he might not care to have." This definition was also used by McNair J. in *Taylor* v. *Kenyon*[55] in which case Lord Goddard C.J. introduced a slight but significant variation by omitting the word "deliberately" and deeming it sufficient if a man "refrains from getting information which he did not want to get." As to the vivid expression "shutting his eyes to the obvious" it is only necessary to refer to the suggested model direction to the jury in *R.* v. *Cohen*,[56] repeated recently in *Sayce* v. *Coupe*.[57]

Earlier in this article it was suggested that a close affinity exists between connivance and that state of mind known as recklessness. The latter, which has been judicially defined as "an attitude of mental indifference to obvious risks,"[58] envisages the mind of a person who actually foresees the consequences of his conduct and,

[52] (1914) 11 Cr.App.R. at p. 49.
[53] [1937] 1 All E.R. at p. 353.
[54] *Ibid.*, at p. 354.
[55] [1952] 2 All E.R. 726. See a note on this case in (1953) 16 M.L.R. 232.
[56] In addition to providing a further example of the use of this particular phrase to describe connivance, Lord Goddard's judgment in *Cohen* provides authority for the proposition that the doctrine of connivance extends into the field of fraudulent offences (see [1951] 1 K.B. at p. 508). *Cf.* the position in civil actions for fraud or deceit as stated by Lord Herschell in *Derry* v. *Peek* (1889) 14 App.Cas. 337, at p. 374.
[57] [1952] 2 All E.R. 715, at p. 717.
[58] Eve J. in *Hudston* v. *Viney* [1921] 1 Ch. 98, at p. 104. See, too, Austin, *Jurisprudence*, 3rd ed., Vol. 1, pp. 440–2, and the 7th Report of H.M.'s Commissioners of Criminal Law (1843), pp. 25–6. The increasing adoption of recklessness as invoking criminal liability is exemplified by the offences created in the Iron and Steel Act, 1949 (12, 13 & 14 Geo. 6, c. 72), s. 54; the Docking and Nicking of Horses Act, 1949 (12 & 13 Geo. 6, c. 70), s. 2 (3) (*b*) and s. 2 (4); and the Diseases of Animals Act, 1950 (14 Geo. 6, c. 36), s. 7 (1).

though not seeking those consequences, deliberately takes the risk of their happening. Aptly described as an " I don't care " attitude, recklessness has hitherto been considered principally in relation to murder [59] and manslaughter [60] in both of which the doctrine of constructive *mens rea* has become firmly established. Take whichever definition of connivance you please—in particular, the wilful shutting of the eyes to obvious means of knowledge—and the close relationship which exists between the two concepts becomes immediately evident.

Yet, surprisingly, throughout the cases discussed above no single reference to the term " recklessness " can be found. Indeed, it is possible to find only one instance in which the similarity of mind characterising both recklessness and connivance appears to have been grasped or, at least, to have been judicially expressed. That occasion arose in the recent civil case of *McLeod* v. *Buchanan* [61] in which, construing the word " permits " which forms the basis of the penal section 35 (1) of the Road Traffic Act, 1930, Lord Wright stated [62] : " In order to give permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes." It so happens that in that case Lord Wright went on to express the view that negligence is sufficient to establish liability under section 35, and it will be necessary to consider that opinion later in the light of the

[59] Thus, where a person kills another intending only to inflict serious bodily harm he is, nevertheless, guilty of murder: see *R.* v. *Lumley* (1911) 22 Cox 635, and the directions to the jury in the recent cases of *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141, *R.* v. *Bloom* (1952) *The Times*, February 7, and *R.* v. *Craig and Bentley* (1952) *The Times*, December 12. The basis of this principle, it is suggested, is that the accused, by his intention to occasion grave personal injury, in fact exhibits recklessness as to the foreseen possibility of death: see Russell on *Crime*, 10th ed., Vol. 1, p. 543, n. 69a.

[60] Despite trenchant criticism (see, *e.g.*, Turner, *Modern Approach to Criminal Law*, pp. 209–11, Dean (1937) 53 L.Q.R. 380, and Glanville Williams, *Criminal Law*, pp. 49–51), judicial practice continues to define recklessness as a " high degree of negligence." See, in manslaughter cases, *Andrews* v. *D. P. P.* (1937) 26 Cr.App.R. 34; *Bonnyman* (1942) 28 Cr.App.R. 131; *The People* v. *Dunleavy* [1948] Ir.R. 95; and more recently, in connection with the Prevention of Fraud (Investments) Act, 1939, s. 12 (1), Donovan J. in *R.* v. *Russell* [1953] 1 W.L.R. 77, at p. 80. *Cf.* Lord Goddard C.J. in *Pentecost* v. *London District Auditor* [1951] 2 K.B. 759. Whereas criticism is directed against the recognition of negligence as a *state of mind* meaning blameful inadvertence, it seems clear that judicial interpretation is directed to the *conduct* of the accused from which the necessary foresight of consequences, essential to the concept of recklessness, is more readily assumed. The forming of this assumption proceeds through various degrees of certainty according to the particular circumstances of each case, so that the more reprehensible the behaviour of the accused the readier will the assumption be reached that he must have foreseen the results of his conduct. The necessity in such cases, it is suggested, is to distinguish between the *conduct*—sometimes loosely termed objective recklessness—which goes to prove the matter in issue, and the *matter in issue* itself, which is the particular state of mind described as subjective recklessness.

[61] [1940] 2 All E.R. 179.

[62] *Ibid.*, at p. 187.

other authorities on the topic. But the passage quoted remains a strangely isolated instance where the two states of minds were brought into harmony.

Judges are not alone in failing to grasp the synonymous nature of connivance and recklessness. Thus, successive editions of Kenny's *Outlines of Criminal Law* [63] have contained the statement, in relation to guilty knowledge in charges of receiving, that "negligence, or even recklessness, in not realising their having been stolen will not create guilt: he must have shut his eyes wilfully to facts which ordinary men would realise clearly." The concept involved in the latter part of this statement is, of course, connivance which, as Lord Wright recognised, is indistinguishable from recklessness. Insomuch as the authorities clearly indicate that connivance is a culpable state of mind in statutory offences involving guilty knowledge, it is difficult to understand why recklessness is excluded in cases of receiving stolen goods.

Yet such was the ruling of the Court of Criminal Appeal in *R.* v. *Harvard*,[64] which case is cited in *Kenny* as authority for the proposition quoted above. Delivering the short judgment of the court, consisting of Darling J., Bray J. and himself, Ridley J. declared [65]: ". . . it is not sufficient to say that if a man is reckless and does not care he is just as guilty as if he received the property, knowing at the time that there was something wrong with it." "The proper direction," according to the court, "is that the jury must take into consideration all the circumstances in which the goods were received, and must say if the appellant, at the time when he received the goods, knew that they had been stolen." In assessing the correctness of this ruling it is necessary to distinguish carefully between the *method of proof*, whereby guilty knowledge is usually deduced from the surrounding circumstances, and the *matter to be proved* which, it will be observed, the court said is actual knowledge that the goods had been stolen. According to the decision in *R.* v. *Harvard*, belief that the goods may or may not have been stolen coupled with indifference as to the true position is not enough. But is this not the interpretation to be placed upon the earlier direction in *R.* v. *White*,[66] not apparently cited in *Harvard*, in which Bramwell B. had said to the jury it is sufficient "if you think the circumstances were such, accompanying the transaction, as to make the prisoner believe that it had been stolen." The headnote to that case, it is suggested, accurately embodies the true principle which ordains that belief without actual knowledge is sufficient to establish guilt, provided, of course, that the accused refuses to pay heed to that belief and proceeds to receive the stolen goods. Such was the interpretation placed on

[63] See 15th ed., p. 292, n. 4, and 16th edition by Turner, p. 291, n. 7.
[64] (1914) 11 Cr.App.R. 2.
[65] *Ibid.*, at p. 3.
[66] (1859) 1 F. & F. 665.

R. v. *White* by Kenny, who did so in terms appropriate to connivance. Whether the state of mind is described as connivance or recklessness, it is submitted that this principle should be adopted in charges of receiving, thus bringing such cases into line with the other authorities examined above.[67]

Negligence

Negligence, in the sense of blameful inadvertence, occupies a major role in the field of tortious liability where the principal accent is on compensation. Not unexpectedly, when consideration is given to the role of negligence in criminal law the immediate reaction is usually one of violent antipathy, the view being widely held that liability arising out of negligence is incompatible with the deterrent nature of criminal punishment.[68] Furthermore, views continue to differ as to whether inadvertence can properly be designated a form of *mens rea*. Where the phrase *mens rea* is used to denote a state of mind it is possible to argue that the only state of mind which is pertinent is the positive form known as advertence, *i.e.*, realisation or foresight of consequences, in which event the ambit of *mens rea* is restricted to intention and subjective recklessness. Conversely, it is possible to argue that although inadvertence involves the negative form of absence of realisation or foresight of consequences, it, too, can justifiably be termed a state of mind and, therefore, as forming, in certain conditions, part of the doctrine of *mens rea*. So far as the particular field of criminal liability being discussed in this article is concerned, the present writer is of the opinion that negligence may properly be designated as *mens rea*. To those who would deny the validity of this conclusion it may come as a surprise to realise that there exists a wide range of judicial dicta in which the view is expressed that if a statutory offence is based upon proof of knowledge such crime can be committed negligently, a conclusion denied by Devlin J. in *Roper* v. *Taylor's Central Garages*.[69] Speaking of the states of mind relevant in statutory offences involving guilty knowledge, Devlin J. stressed the vast distinction between connivance, or, as he described it, knowledge of the second degree, and the state of mind encompassed

[67] It is worth noting that Turner (see 16th ed., p. 287) adopts the suggestion, made by Kenny, that in obtaining by false pretences recklessness is sufficient to establish knowledge of the falsity of the pretence. On the other hand, Glanville Williams, *Criminal Law*, considers that the two concepts, connivance and recklessness, are distinguishable, the former being merely "a special case of recklessness" (p. 59). According to the learned author (p. 127), before the doctrine of connivance, *i.e.*, wilful blindness, applies, there must be realisation that the fact in question is probable, whereas for recklessness it is sufficient to prove realisation that the fact in question is possible (*cf.* p. 53). This, it is suggested, places the standard of recklessness at too low a level.

[68] See Jerome Hall, *Principles of Criminal Law*, pp. 215–25, 235–9, 244–6, Turner, *Modern Approach to Criminal Law*, pp. 205–11, and Glanville Williams, *Criminal Law*, pp. 88, 99.

[69] [1951] 2 T.L.R. at p. 289.

by the words "ought to have known," which he defined as "neglecting to make such inquiries as a reasonable and prudent person would make." According to Devlin J. "the case of shutting the eyes is actual knowledge in the eyes of the law, the case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law." [70]

However, evidence is available as early as 1862 [71] that negligence would be deemed sufficient in a statutory offence dependent on proof of knowledge of the forbidden act or default. In *Croasdill* v. *Ratcliffe*,[72] the court was concerned with section 72 of the Highways Act, 1835, which makes it an offence, *inter alia*, for any person to suffer filth or other noxious substances to flow into the highway. Interpreting this offence, and comparing it with the offence (under the same section) of wilfully obstructing the highway, Crompton J. declared [73]: "The section applies to cases of persons who are guilty of negligence in suffering . . . filth to run on to the highway." With this opinion Wightman J. agreed. Equally categorical was the opinion of Cockburn C.J. in *Bosley* v. *Davies*,[74] when he declared, in the course of the preliminary argument: "A man may be said to 'suffer' a thing to be done if it is done through his negligence." [75] Notwithstanding this opinion, however, the short judgment of the court contains no reference to negligence, the case being returned to the justices with an intimation that actual knowledge or connivance was necessary. In adding that "constructive knowledge will supply the place of actual knowledge," [75] it is fairly obvious that the court was using constructive knowledge as descriptive of connivance, but we shall see, in later cases, that the expression has been used occasionally to cover negligence.

Indications are that judges of the late nineteenth century were far from clear as to the exact boundaries of connivance and negligence. This confusion becomes apparent on reading the case of *Crabtree* v. *Hole*,[76] in which the familiar offence of suffering gaming was once more involved. Referring to section 17 of the Licensing Act, 1872, Cockburn C.J. said [77]: "The duty imposed by the enactment is to take reasonable care that gaming is not suffered on the licensed premises," and earlier, the same judge epitomised the position by saying that the licensee "must show

[70] *Loc. cit.*
[71] Rather nebulous dicta to the same effect were expressed in *Hearne* v. *Garton* (1859) 28 L.J.M.C. 216, at p. 219.
[72] (1862) 4 L.T.(N.S.) 834.
[73] *Loc. cit.*
[74] (1875) L.R. 1 Q.B. 84.
[75] *Ibid.*, at p. 87.
[76] (1879) 43 J.P. 799.
[77] *Loc. cit.*

reasonable diligence." This definition of the licensee's duty conforms with Cockburn C.J.'s previous statement in *Bosley* v. *Davies* that a publican "suffers" gaming if it is done through his negligence. The other member of the court, Lush J., agreed with the Chief Justice, adding that he could see no distinction between the case before him and *Redgate* v. *Haynes*,[78] in which Lush J. had participated with Blackburn J. Yet, in that earlier case, it had been held that actual knowledge or connivance—in the sense of purposely abstaining from ascertaining whether gaming was going on or not—was necessary. This blurring of the distinction between the two degrees of knowledge is not very helpful, but it does not prevent the growing feeling that a licensee is equally liable for suffering gaming if his conduct amounts to either connivance or negligence. In subsequent cases, like *Somerset* v. *Hart*[79] and *Bond* v. *Evans*,[80] there is a reversion to the "actual knowledge or connivance" test, but it is noticeable that Manisty J., in *Bond* v. *Evans* refers,[81] without dissent, to the observation of Cockburn C.J. in *Bosley* v. *Davies*.

An analogous offence to "suffering" gaming, in the sense that *mens rea* in the form of "allowing" is necessary, is that created by the Highways Act, 1835, section 35 of which provides that any surveyor who allows a heap of stones to remain on the highway at night to the danger of passers-by shall be guilty of an offence. The question whether negligence is sufficient to establish liability for this offence arose in *Hardcastle* v. *Bielby*,[82] in which it appeared that the chips had been laid on the roadway by a carter, but the surveyor himself knew nothing about the heap of stones. Referring to the word "allows," Collins J. said it "seems to admit the consideration whether or not the offence can be committed where negligence on the part of the surveyor has been proved, although he may not have been proved to have any personal knowledge that the acts which have caused the injury have taken place."[83] Tantalisingly, the learned judge left the matter there, it being unnecessary, he said, actually to decide the question as there was no evidence of negligence on the part of the surveyor. Had Collins J. been forced to give his answer it is likely that he would have referred to the wording of section 35 which, in laying down the conditions of liability, adds ". . . all due and reasonable precautions not having been taken by the said surveyor to guard against the same." This clause, strongly indicative that the offence can be committed negligently, is one of the earliest examples of a proviso—sometimes in a positive, sometimes in a negative, form—

[78] (1876) L.R. 1 Q.B. 89.
[79] (1884) 12 Q.B.D. 360.
[80] (1888) 21 Q.B.D. 249.
[81] *Ibid.*, at p. 253.
[82] [1892] 1 Q.B. 709.
[83] *Ibid.*, at p. 712.

which occasionally has been inserted in the definition of statutory offences based on the epithets "knowingly" "permitting" and "suffering."[84]

It will have been noticed that as frequently as not the legislature and the courts appear to be concerned with negligence as a state of conduct, and it may be suggested that this bears no relation to negligence as a state of mind, in the sense of inadvertence. Certainly it is difficult to trace any consistency in the manner in which the legislature, in creating new offences, and the judges, in interpreting such offences, sometimes rely on negligence as a state of mind and sometimes as a state of conduct. The correct approach it is suggested, is this: Where the offence makes no reference to any requirement of knowledge, but seeks to punish carelessness or negligence, then it is with negligent conduct alone that the court is concerned. Where, however, the offence is based on words like "permitting," "suffering," "allowing" or "causing," which indicate the necessity for guilty knowledge, the courts are prepared to attribute such knowledge to the accused if his conduct, in all the circumstances, indicates that he ought to have known. The difference between connivance and negligence in this respect is that where negligence is accepted as culpable then the court recognises a lower standard of conduct as manifesting the requisite guilty knowledge.

Additional evidence of the culpability of negligence is forthcoming in the person of Mathew J. who, in *Somerset* v. *Wade*,[85] summed up the position by saying[86]: "It comes to this, that a licensed person cannot be convicted of suffering gaming in the absence of knowledge, or connivance, or carelessness on his part." Effect to this dogma was given by Grantham and Collins JJ., in *Worth* v. *Brown*,[87] a case of permitting drunkenness on licensed premises.[88] in which the police had found a man sitting on a seat

[84] See the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 1 (2); the Rivers (Prevention of Pollution) Act, 1951 (14 & 15 Geo. 6, c. 64), s. 2 (3) (*b*), and the Food and Drugs Act, 1950 (14 Geo. 6, c. 35), s. 8 (2). Comparison may be made with similar provisions in offences of absolute liability, *e.g.*, Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (2) (*a*); Fertilisers and Feeding Stuffs Act, 1926 (16 & 17 Geo. 5, c. 45), s. 7 (1); Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6, c. 89), s. 15 (3) and s. 19 (2); Food and Drugs Act, 1950 (14 Geo. 6, c. 35), s. 26 (3) (*a*) and (*b*); Diseases of Animals Act, 1950 (14 Geo. 6, c. 36), s. 78 (2) and s. 83. Such an escape route is also frequently inserted in statutory offences where it is sought to make an employer or principal vicariously liable, examples of which are to be found in the Truck Amdt. Act, 1887 (50 & 51 Vict. c. 18), s. 12; Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 1 (2); Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 4 (2) and (3); Factories Act, 1901 (1 Edw. 7, c. 22), ss. 140, 141; Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 12 (5); and the Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 83 (1).

[85] [1894] 1 Q.B. 574.

[86] *Ibid.*, at p. 576.

[87] (1896) 40 S.J. 515. *Cf. Greenwood* v. *Backhouse* (1902) 66 J.P. 519, in which a "suspicious amount of ignorance" was held not to amount to guilty knowledge in a case of causing cruelty under the Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92).

[88] Licensing Act, 1872, s. 17, re-enacted in the Licensing Act, 1953, s. 136 (1).

asleep, in full sight of the bar, very drunk. The barmaid, who was in charge at the time, said that she had no knowledge that a drunken person was on the premises, but the court being of opinion that she must have been aware of the man's condition, remitted the case with directions to convict.

So far we have been concerned with offences dealing with the "suffering," "allowing" or "permitting" of criminal acts. Another epithet which has been consistently interpreted as requiring proof of guilty knowledge is the word "causing,"[89] and it is interesting to compare the views expressed in *R.* v. *Chainey*[90] and *Moses* v. *Midland Ry.*[91] on the application of negligence in offences based on this expression. In *R.* v. *Chainey*, a father was charged with causing the unlawful carnal knowledge of his daughter under sixteen, contrary to the Children Act, 1908, s. 17,[92] which enacts that any person, having custody of a girl under age, who knowingly allows her to consort with any prostitute, shall be deemed to have caused the unlawful carnal knowledge. Quashing the conviction, which was based on the jury's finding of criminal neglect, Isaacs C.J. declared that "negligence is not an offence under the enactment in question. The offence is causing or encouraging, and the evidence must at least amount to knowingly allowing. To allow knowingly would seem to include negligence, but negligence does not amount to conscious permission."[93] No discussion of any cases appears to have taken place, and it is worth noting that the Chief Justice confined his remarks expressly to the statute under consideration.

An offence of quite a different character was involved in *Moses* v. *Midland Ry.*, in which the defendants were charged under the Salmon Fishery Act, 1861, s. 5, with "causing or knowingly permitting any substance to flow into any waters with the result that fish are poisoned or killed." Owing to a defect in a tank wagon which was travelling on the defendants' railway, creosote leaked through the permanent way into a river containing salmon, killing some of the fish. The court dismissed the appeal against acquittal on the ground that the creosote had escaped without the knowledge of the railway company or their servants, and that no exercise of reasonable care on their part could have prevented it. The underlying principle, according to Avory J., was that "a person cannot be said to cause liquid to flow when he is ignorant that it is flowing and could not by the exercise of reasonable care have

[89] Reference may be made to *Harrison* v. *Leaper* (1862) 5 L.T. 640 (in which Fitzjames Stephen appears in the reports in the unusual role of counsel); *Small* v. *Warr* (1882) 47 J.P. 20; *Hardcastle* v. *Bielby* [1892] 1 Q.B. 709; *Reynolds* v. *G. H. Austin & Son, Ltd.* [1951] 2 K.B. 135; *Rushton* v. *Martin* [1952] W.N. 258 and *Shave* v. *Rosner* [1954] 2 W.L.R. 1057.

[90] [1914] 1 K.B. 137.

[91] (1915) 84 L.J.K.B. 2181.

[92] Re-enacted in the Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 2.

[93] *Ibid.*, at p. 143.

prevented it." [94] From this it may fairly be deduced that had the company not taken reasonable precautions to discover the escape and thus be in a position to prevent the creosote flowing into the river, they would have been held liable on the ground of negligence.

How to reconcile these conflicting views on the application of negligence is a difficult task. Limiting the opinions expressed to the respective offences is, of course, one way of disposing of the difficulty. On the other hand, there is no denying the fact that both defendants were charged with criminal offences arising out of the same formula of causing forbidden acts. The true explanation to the wider liability outlined in *Moses* v. *Midland Ry.*, it is suggested, lies in the nature of the offence involved which, as Cockburn C.J. once said of suffering gaming, is " on the confines between a civil and criminal offence." [95] In the offence of causing the unlawful carnal knowledge of a girl under sixteen or, to take another example with which we have been concerned, receiving stolen goods, the *mens rea* or guilty knowledge is more akin to the old *mala conscientia* or evil design, and carries with it more severe punishment than in the case of offences like permitting drunkenness, suffering gaming, or knowingly permitting pollution of rivers which do not embody the same degree of moral blameworthiness. Hence, whereas in the case of the former crimes, actual knowledge or connivance is required, in offences bent on maintaining a certain standard of behaviour for the protection of the public and based upon an objective criterion, negligence is more readily accepted.

Another compendious expression sometimes used to describe negligence is the phrase " ought to have known " [96] which, probably gleaned from the realm of tortious negligence, appears to have come to the fore during the last twenty years. It was adopted by Avory J. in *Goldsmith* v. *Deakin*,[97] when considering the offence of permitting a motor-vehicle to be used as an express carriage without the requisite licence. In a passage which was subsequently cited with approval by Lord Hewart C.J. in *Newell* v. *Cross and Cook*,[98] and again in *Evans* v. *Dell*,[99] Avory J. stated [1]: " . . . if a person hires out a vehicle in circumstances which he ought to know that it probably will be or may be used as a stage carriage, and puts

[94] *Ibid.*, at p. 2184. Avory J. apparently saw nothing incongruous in stating, earlier: "It appears to me to be one of those cases in which it is not necessary to prove *mens rea*. There is an absolute prohibition . . ."

[95] (1879) 43 J.P. at p. 799.

[96] *Cf.* its use in *Lee* v. *Taylor and Gill* (*supra*), in which Lord Alverstone C.J. appears to equate the phrase with connivance.

[97] (1934) 150 L.T. 157. *Cf. Clydebank Co-op. Socy.* v. *Binnie*, 1937 J.C. 17 (Sc.).

[98] (1936) 52 T.L.R. 489, at p. 491.

[99] [1937] 1 All E.R. at p. 352.

[1] 150 L.T. at p. 158. Referring to this passage, Glanville Williams, *Criminal Law*, p. 130, n. 15, accepts the possibility that it might be understood as meaning that negligence in not finding out the proposed use of the vehicle is enough, but submits that this would be too stringent a rule. The learned author adds that " what is or should be required is not inadvertent negligence but a conscious adversion to the risk."

his servant in charge of that vehicle to use it in any way in which the hirer may choose to direct the servant to use it, then he is, within the meaning of this statute, permitting it to be used—without the appropriate licence." Although Avory J. was content to rest liability, at its minimum, on negligence it is evident that Lawrence J., the other member of the court, had different ideas, his view being that, in the absence of actual knowledge, it was necessary to establish recklessness. How otherwise is the passage to be explained in which Lawrence J. said [2]: " . . . although the respondent may not have known affirmatively the way in which the vehicle was being used, if in fact he allowed it to be used and did not care whether it was used in contravention of the statute or not, he did, in my view, permit the use." A further example of the reliance on negligence as involving liability for the same offence is afforded by the recent case of *Browning* v. *J. W. H. Watson, Ltd.*,[3] in which two persons in the employ of the Ministry of Transport insinuated themselves among the members of a private club and travelled on the respondent's coach to and from a football match. Holding the coach proprietor liable, Lord Goddard C.J. said [4]: " . . . although [the respondent] did not know that persons who were not members of the club got in the coach, that was because he did not inquire or take any precaution to see that only members were admitted. . . . Of course, this was not a wilful violation, but it is clear that the respondent should have taken some precaution." There was no suggestion of connivance and it is suggested that the Lord Chief Justice's language bears all the signs of referring to negligence on the part of the coach proprietor.

With the natural antipathy which exists against introducing negligence into criminal liability, it is only to be expected that now and again certain of the more conventionally minded judges and writers affirm the principle that intention or recklessness, actual knowledge or connivance, present the very limits of criminal responsibility. It is, of course, true that the phrase " ought to know " is capable of different shades of meaning, and it may be questioned whether Avory J. had in mind conduct amounting to mere negligence. In cases subsequent to *Goldsmith* v. *Deakin*, which deal with the same offence, Lord Hewart C.J. is seen repeating the test laid down by Avory J., but it is noticeable that in *Evans* v. *Dell* Goddard J. used the phrase " shutting his eyes to the obvious " as bearing the hallmark of liability.[5]

This view, that nothing less than recklessness or connivance will suffice, would appear to have been rejected by Lord Wright in

[2] *Ibid.*, at p. 159.
[3] [1953] 2 All E.R. 775; [1953] 1 W.L.R. 1172.
[4] *Ibid.*, at p. 778.
[5] [1937] 1 All E.R. at p. 354.

McLeod v. *Buchanan*.[6] That was a case, it will be recalled, in which the House of Lords was required to consider section 35 (1) of the Road Traffic Act, 1930, which makes it a criminal offence to permit another person to use a motor-vehicle on a road without there being in force a policy of insurance covering third-party risks. "In order to prove permission," said Lord Wright, "it is not necessary to show actual notice . . . or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of the eyes." Instead, "the practical way of stating the crucial question" was to ask the question, "Did the defendant know or ought he to have known that the van was being or was likely to be used by his brother for his own private purposes?"[7] If the answer is in the affirmative, a case of permission is made out. The same test was applied by Lord Russell of Killowen,[8] and, it is submitted, is manifestly a test based on negligence.[9]

It is in the light of the considerable body of judicial dicta discussed above that the soundness of Devlin J.'s analysis in *Roper* v. *Taylor's Central Garages* may be judged. At the outset of this article it was suggested that the learned judge's conclusions should be treated with considerable reserve, based as they were on apparent absence of any citation or discussion of the relevant cases. Now that an exhaustive study has been carried out it becomes clear that Devlin J.'s exclusion of negligence from this particular expanse of criminal liability, though deriving sporadic support, is in direct conflict with the majority of dicta dealing with offences of the very kind referred to by Devlin J., in which negligence has been stated to be a culpable state of mind.[10] However, in conclusion, it is necessary to emphasise that this rule, in so far as it may be said

[6] [1940] 2 All E.R. 179. Who can commit the offence under s. 35 (1) was considered in *Lloyd* v. *Singleton* [1953] 1 All E.R. 291, in which the Divisional Court referred to MacKinnon L.J.'s view, expressed in *Goodbarne* v. *Buck* [1940] 1 K.B. 771, that only the owner of the vehicle could be charged, as having been made *per incuriam*.

[7] *Ibid.*, at p. 187.

[8] *Ibid.*, at p. 185.

[9] Having regard to his views on the test propounded by Avory J. in *Goldsmith* v. *Deakin* (see note 1, *supra*), it is not surprising to note that Glanville Williams, *Criminal Law*, p. 41, refuses to accept Lord Wright's dictum as correctly stating the present position in relation to negligence in statutory offences.

[10] Referring to Devlin J.'s analysis in *Roper*. Jerome Hall in (1951) 33 Nebraska L.R. 3 at p. 6 writes: "Punishment of inadvertent adults is a sorry business, it has no proper place in modern criminal liability." At the same time Hall maintains that whatever views one takes regarding the utility of offences of absolute liability "it is everywhere recognised that the law of strict liability is not criminal law." A more realistic approach is to recognise the existence of this increasing field of criminal liability and to face up to the considerable gap which exists between, on the one hand, liability based upon actual knowledge or connivance and, on the other hand, absolute prohibition. Is it better for the legislature and the courts to be left with the task of making up their minds between these two exclusive forms of liability? Or is it preferable, as suggested by the present writer, to put forward as another alternative to absolute prohibition, an intermediate theory of liability based upon blameful inadvertence?

to exist, does not extend to all statutory crimes in which *mens rea* is required. The sufficiency of negligence as *mens rea* would appear to be limited to that special class of offences, based on "permitting," "suffering" and other similar expressions, in which the degree of moral blameworthiness is of a lesser character than that involved in offences such as receiving goods knowing them to be stolen, whose qualities are more emphatically criminal. So far as actual knowledge and connivance are concerned, on the other hand, it is submitted that no such dividing line exists, all statutory offences involving guilty knowledge being treated alike in this respect.

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JURY DISCRETION IN MURDER TRIALS

> "Nothing is more true of my profession than that the most eminent among them, for one hundred years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration. The history of legal procedure is the history of rejection of reasonable and civilised standards in the administration of law by most eminent judges and leading practitioners."
>
> The Honourable Mr. Justice Frankfurter, of the United States Supreme Court, giving evidence before the Royal Commission on Capital Punishment, July 21, 1950. Minutes of Evidence, 26th Day, p. 582.

THE object of this article is to attempt a careful examination of the most controversial proposal made by the Royal Commission on Capital Punishment, *viz.*, the proposal to entrust to the jury after a conviction in capital cases discretion to decide whether there are any extenuating circumstances which make it undesirable that the capital penalty should be imposed.[1]

What the Commission suggest is that a trial for murder [2] should be divided into two stages. The first part of the trial would be directed solely to the issue of guilt or innocence, and would conclude with the verdict of the jury on that issue. The second part of the trial would be directed to the question whether there are any extenuating circumstances, and this would be a matter for the jury to decide by a unanimous verdict. There would be placed before them such information as to the prisoner's history, character, mental condition and other mitigating factors as the defence chose to bring forward. The prosecution would not play an active role in the proceedings, but if the judge thought that the jury were in danger of being misled he would ask the prosecution to call any relevant evidence. It would be the duty of the judge to introduce the second stage of the trial by explaining to the jury what their duty was, and he would sum up to the jury on the question of extenuating circumstances before they considered their verdict. If the jury found there were extenuating circumstances the judge would be bound to pronounce a sentence of imprisonment for life.

Two stages or one?

The first question which calls for consideration is whether it is necessary to divide the trial into two stages, as the Commission

[1] The Report of the Royal Commission appointed in 1949 was published in September, 1953 (Cmd. 8932), and was reviewed by the present writer in 17 M.L.R. 57–65 (January, 1954).

[2] The Report does not consider whether the other capital offences apart from murder should be included in this procedure, but there seems to be no reason why they should not.

suggest. This two-stage system is by no means the only way in which a system of jury discretion might be instituted.[3]

In the United States of America, the great majority of the states have instituted a system of jury discretion. There are so many variations in the detailed provisions that generalisation is difficult if not in fact dangerous.[4] However, the Commission's Report says that wherever the jury have such a discretion, " it must be exercised as part of their verdict on the issue of guilt or innocence," in other words, there is only one stage, not two. This means that the jury's decision " must be taken on the basis of such information about the facts of the crime and the character and circumstances of the offender as have been made available at the trial." [5] It is recognised in some quarters, the Report observes, that this system involves serious drawbacks, the principal defect being " the jury's inadequate knowledge of the offender's background, history, mental condition and other relevant factors." [6] Thought is being given to methods of improving the procedure, and in one state, Pennsylvania, the introduction of a two-stage system has been recommended by a committee.[7]

In Belgium, where a system of discretion has been in operation since 1919, the discretion is vested in the judges and the jury deciding jointly, and the trial is divided into two stages.[8] In South Africa, where a discretion has been vested in the jury in relation to extenuating circumstances since 1935, there are also two stages.[9] The system appears to have worked well in both these countries.[10] The reason why the Commission prefer the separation of the jury's decision concerning the guilt of the prisoner from its decision concerning sentence and extenuation is that in this way it is possible to allow evidence to be brought forward relevant to the question of extenuation which could not fairly be admitted if the guilt of the prisoner had not already been determined, because of its prejudicial character. The Commission have undoubtedly chosen wisely in deciding to follow the Belgian and South African pattern

[3] § 551, p. 194, discusses the various possibilities.

[4] See the repeated warnings uttered by Mr. Justice Frankfurter in giving evidence before the Commission concerning the danger of generalising about American experience: Minutes of Evidence, 26th Day.

[5] § 587, p. 206.

[6] § 592, p. 207.

[7] § 590, p. 207. See also Robert E. Knowlton's article entitled " Problems of Jury Discretion in Capital Cases," 101 *University of Pennsylvania Law Review*, 1099–1136, June, 1953. At p. 1135 he says that " in recent years there has been considerable agitation in Pennsylvania to establish a system of separate hearings for the issue of guilt and the question of punishment. . . . The necessity of a statutory provision establishing a second hearing for determining punishment is most pressing in Pennsylvania, because in that state evidence of other crimes may be introduced prior to conviction." Mr. Knowlton is in favour of the proposed change.

[8] §§ 581 and 582 of the Report, p. 204, and Appendix 13, pp. 475 *et seq.*

[9] § 584, p. 204, and Appendix 13.

[10] § 583, p. 204 (Belgium); § 585, p. 205 (South Africa).

in formulating their proposals in preference to the practice in the United States.

The plea of guilty

In order that their proposals might be effective, it was obviously necessary for the Commission to consider what should be done when the prisoner desires to plead guilty, for in those circumstances no jury is sworn under the present law. Various solutions of this problem are possible. It might be provided that in a case where a prisoner pleaded guilty to a capital charge, he would be sentenced to death automatically, the question of extenuating circumstances not being considered. Such a rule would encourage persons to plead not guilty in such cases, which they are already strongly advised to do. Alternatively, it might be provided that, where a prisoner has pleaded guilty, the judge should have a discretion as to the appropriate sentence. This is the practice in nearly all the states of America,[11] but the Commission do not mention this in the paragraph discussing this problem,[12] and presumably they thought such a solution would be too unacceptable here to merit serious consideration. Another possibility is that a jury might be sworn to try the issue of extenuation only. The Commission favour as a solution the adoption of the rule which already applies in Scotland and, it seems, New Jersey, *viz.*, that a plea of guilty to a charge of murder should be inadmissible. They admit that this may prolong the proceedings in cases where the circumstances are most distressing, *e.g.*, "mercy killings," but they do not consider this to be a serious objection. There is much to be said for this proposal.

The plea of the defence relating to extenuation

The Commission propose that, where a prisoner has been found guilty of murder, immediately after the conclusion of the first stage of the trial the judge should tell the jury what is required of them further.[13] Then the counsel for the defence should be free to call any witnesses he may wish to speak to the prisoner's character, history, mental condition or other mitigating factors.[14] It is admitted in the Report that it would be impossible to prescribe any limits to the evidence which the defence might call at this stage, although it is suggested that reasonable limitations would probably grow up in the practice of the courts.[15] The danger that the jury would tend to be moved by the rhetorical speeches of counsel is expressly recognised,[16] but it is thought that this danger, like others perceived in these proposals, has been exaggerated, and that

[11] Appendix 11, § 77, pp. 460–1.
[12] § 577, p. 196.
[13] § 559, p. 197.
[14] § 561, p. 197.
[15] *Ibid.*
[16] § 570, p. 200.

members of the bar can be relied upon to develop their own standards of appropriate professional conduct in this matter in due course. In any case, it is possible that the judges might exercise some control over counsel in what is permitted to be said.[17]

The role of the prosecution

The role envisaged for the prosecution at the second stage of the trial is essentially a passive one.[18] It is felt to be contrary to the recognised traditions of the English Bar that counsel should be placed in a position where he appeared to be pressing for the death sentence, and it is suggested that he should take no active part in the proceedings on the issue of sentence, but should be present only as *amicus curiae*. He should not call witnesses, nor cross-examine witnesses called by the defence. He should, however, make available to the defence and to the judge any relevant information about the prisoner's character and antecedents. The Report continues: "It would then be open to the defence to produce any information favourable to the prisoner, and if the judge thought that the jury might be misled, . . . it should be open to him to ask counsel for the prosecution, as *amicus curiae*, to call the relevant evidence. To comply with such requests should be the sole function of the prosecution at this stage."[19] Counsel for the prosecution would not be entitled to make any speech at this stage of the trial.[20]

One of the major objections to these proposals is that they do not allow for the testing of any evidence which the defence may call by the usual forensic method of cross-examination. As Lord Oaksey observed, in the House of Lords debate on these proposals, on December 16, 1953,[21] "to take the evidence which is put forward by the witnesses for one side and not to test it by cross-examination will not lead you to the truth."[22] The learned lord thought that this scheme would result in the verdicts of juries being perverted by the way in which the evidence had been presented to them, and it must be admitted that there is much weight in this objection. It is not met by the possibility that the judge may request the prosecution to call rebutting evidence, and unless the trial judge is to take upon himself the burden of testing the defence evidence in mitigation, it is difficult to see how it can be overcome. In Belgium, we are told, it is not usual for the defence to call additional witnesses on the issue of sentence. Both the prosecutor and the defence address the court at this stage.[23] The same picture is received of the practice in South Africa. The calling

[17] This appears to be the position in the United States. See Knowlton, *loc. cit.*, p. 1118.
[18] § 560, p. 197.
[19] *Ibid.*
[20] § 562, p. 198.
[21] 185 H.L.Deb. 137–88.
[22] *Ibid.*, column 171.
[23] § 582, p. 204. See also Appendix 13, § 14, p. 477.

of additional evidence is rare, and both prosecutor and defence address the jury.[24] The situation in South Africa differs in one important respect, *viz.*, that the inquiry into extenuation is limited to facts associated with the offence, so that the offender's record and character are excluded as being irrelevant.[25]

The role of the judge

In the second stage of the trial, according to the Commission's proposals, the judge is to have two tasks. These are in addition to the general supervision of the proceedings, and the duty to see that the jury are not misled, to which reference had already been made. First, he is to address the jury on their duty at the very commencement of the second stage, explaining briefly to them "that the sentence prescribed by the law for murder is death unless the jury consider there are reasons, in the circumstances of the offence or of the offender, why that sentence should not be passed on the prisoner; . . . and that certain additional evidence will be put before them to help them in considering this question."[26] It will be important, the Report stresses, that the judge should tell the jury clearly that unless they are all agreed that there are circumstances which justify a lesser sentence, the sentence passed will be that of death, and that the responsibility for that sentence will rest, not on them, but on the law. The Commission suggest that the terms in which the judge is to address the jury at this stage might well be prescribed by statute. Lord Goddard, speaking in the House of Lords debate, said he was not quite sure what the purpose of these preliminary remarks by the judge would be,[27] but with respect it seems evident that they are meant to explain to the jury their duty, which, until the new system had been in operation some time, would be unfamiliar.

The second duty of the judge would be to sum up to the jury on the question of extenuation before they retired to consider their verdict.[28] The Commission consider that "he would no doubt confine himself to a balanced recapitulation of the evidence that might lead the jury to form a more favourable view of the accused and of the evidence that might tell the other way, and refrain from giving them any guidance as to the decision they might reach or from expressing any view on such a question as whether a particular circumstance should or should not constitute a sufficient reason for exempting the prisoner from the death penalty." Several speakers in the House of Lords debate feared that the task of the judge in summing up on this matter would be rendered very

[24] § 584, p. 205. See also Appendix 13, § 32, p. 482.
[25] *Ibid.*
[26] § 559, p. 197.
[27] *Loc. cit.*, column 176.
[28] § 564, p. 198.

difficult by the absence of any definition of what might or might not amount to sufficient extenuation.[29]

What constitutes extenuating circumstances

In the South African statute instituting the system of jury discretion, no attempt was made to define extenuating circumstances, as it was realised that the term must remain elastic.[30] However, "extenuating circumstances" have been judicially defined as "a fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the prisoner's guilt."[31] This is not a very precise definition, and frequently the decisions have had as much to do with the prisoner's condition as with the nature and circumstances of the crime.[32] But this ruling has had one very important consequence: the jury are not usually informed of the prisoner's previous record, because it is not regarded as "a fact associated with the crime."[33] It is the invariable practice for the judge to ask the jury to specify the circumstance or circumstances which they have found to be extenuating, which, as the Commission remark, is "a valuable safeguard against perverse or unfounded verdicts."[34] Moreover, the judge had power to disregard a finding of extenuating circumstances and sentence the offender to death, but in fact this power has never been exercised.[35] According to the evidence of Dr. Lansdown, Q.C., an eminent South African lawyer and former judge, this system has proved very successful and has given "just and reasonable scope for mercy and sound sense without doing violence to any principle of law or logic."[36] The advice given to juries by different judges is on the whole consistent.[37]

In Belgium, as in South Africa, no attempt has been made to define extenuating circumstances, but as the judges retire with the jury to consider the matter jointly, the jury are not without guidance in this matter.[38] They have before them a complete dossier relating to the accused,[39] and are entrusted with a completely unfettered discretion (*apprécient souverainement*). They may admit as extenuating any circumstance whatsoever relating either to the facts of the offence or the condition of the offender. Textbooks give some indication of categories of extenuating circumstances which have been admitted by the courts, but these statements are

[29] Viscount Simon, c. 146; Earl Jowitt, c. 153.
[30] Appendix 13, § 30, p. 482.
[31] *Per* Lansdown J.P. in *R.* v. *Biyana* (1938 E.D.L. 310). This definition was adopted in *R.* v. *Lloyd* (1941 C.P.D. 162).
[32] See the list of examples given at p. 482.
[33] § 584, p. 205.
[34] Appendix 13, § 33, p. 482.
[35] *Ibid.* See also § 584, p. 204.
[36] *Ibid.*, § 35, p. 483. See also § 585, p. 205.
[37] *Ibid.*, § 36, p. 483.
[38] § 581, p. 204.
[39] Appendix 13, § 18, p. 478.

not binding and can never be exhaustive.[40] The extenuating circumstances most frequently admitted in practice are youth, lack of education, previous good character, absence of previous convictions, passion or emotion, and sometimes, though by no means invariably, drunkenness. Also mental abnormality short of insanity is admitted.[41]

In the states of America where the jury have been given a discretion, it has not been fettered in any way by definitions of extenuating circumstances, nor are the juries subject to any guidance or direction from the judge on this matter,[42] though there are exceptions. For example, in Pennsylvania it appears that the judge has a right to comment on the evidence concerning punishment, and this comment has not been limited to pointing out the various facts relevant to punishment, but may contain an appraisal of the weight of the evidence as well. Indeed, the law of that state permits the judge to go even further, and express an opinion upon the punishment to be inflicted, though this rule has been criticised as going too far.[43]

The Commission reach the conclusion that, if a system of jury discretion were to be adopted in Great Britain, there should be no statutory definition of extenuating circumstances. They observe that they were unable to discover any satisfactory basis for dividing murder into degrees, and they consider it would be equally impossible to state in advance what should or should not be regarded as an extenuating circumstance. In their view it would be preferable to leave the decision to the unfettered discretion of the jury "in no sense governed by principles of law."[44]

In supporting this conclusion in the House of Lords debate, Lord Chorley said it was quite reasonable not to embody a definition of extenuating circumstances in the statute which would have to be passed if the Commission's proposals were to be put into effect.

> "By setting out extenuating circumstances, we limit the circumstances to those which are set out in the statute, and it is impossible for the draftsman to foresee every sort of extenuating circumstance which may possibly arise. The judges themselves, in advising juries in cases of this kind, would undoubtedly in a short time build up a jurisprudence which would be flexible and would have all the value of judge-made law, as opposed to rigid definitions in statutes. In the Report of the Royal Commission, the obvious sorts of extenuating circumstances are set out, and I am quite sure that they could be taken by the judges and moulded into a flexible jurisprudence."[45]

[40] *Ibid.*, § 7, p. 476.
[41] *Ibid.*, § 8, p. 476.
[42] § 587, p. 206.
[43] Knowlton, *loc. cit.*, pp. 1123–4.
[44] § 553 (b), p. 195.
[45] 185 H.L.Deb. c. 165.

This notion that the judges would themselves build up a body of case law governing the question of extenuating circumstances finds support in the comments of Mr. Robert E. Knowlton on the Pennsylvania practice. Approving the rule that the judge is entitled to comment upon the evidence concerning punishment, he says :

> " The trial judge should be allowed to bring to the jury's attention the facts pertinent to an intelligent determination of punishment. Such comment is necessary to aid the jury in reaching a just decision, and will lead to a greater standardisation of treatment of substantially similar defendants, and eventually develop a body of case law to act as a guide in the future." [46]

The new role assigned to the jury

Now we come to the question whether the jury is an appropriate body to which to entrust the decision whether capital punishment shall be imposed in any particular case, or whether there are extenuating circumstances. The Royal Commission are confident that no more appropriate body could be desired than the men and women of the jury, who might be regarded as " a microcosm of the community," and a body well suited to reflect the changing attitudes of society towards the infliction of capital punishment.[47] They say that they have been struck by the almost unanimous tributes paid by the judges and other experienced witnesses to " the reliability and common sense " of British juries, and they express their belief that " the qualities they have always displayed in dealing with the issue of guilt or innocence would also be brought to bear if they were required to exercise a discretion with regard to the sentence." [48]

The Commission recognise that institutions which work satisfactorily in other countries may not be well adapted to our own, and that in each of the three countries where jury discretion has been adopted there are important factors which do not exist in Great Britain.[49] Nevertheless they feel justified in drawing certain general conclusions from the experience of those countries. " It seems clear," they say,

> " that, where juries are given discretion to decide whether a lesser sentence should be substituted for the death penalty, they do not ordinarily abuse this discretion by excessive and unjustifiable leniency, and that, even where, as often in the United States, they are not subject to any guidance or control by the judge, but the issue is left to their unfettered discretion, they can be relied on to exercise it reasonably in all but exceptional cases." [50]

[46] *Loc. cit.*, p. 1123.
[47] § 571, p. 200.
[48] § 577, p. 202.
[49] § 594, p. 207. In Belgium, for example, capital punishment is practically in abeyance.
[50] *Ibid.*

They attach little weight to the objection that there would be excessive leniency, nor do they think there would be any serious lack of uniformity in the treatment of like cases.[51]

It is frankly admitted in the Report that the proposal is "a novel and unfamiliar one,"[52] and that it involves a radical departure from the traditional conception of the functions of the jury, but it is argued that this is not necessarily a fatal objection.[53] It is conceded that the general rule that juries should have no concern with sentence is sound, but it is pointed out that the law of murder need not be governed by the general rule, and is in fact already exceptional in many respects. Under the existing law juries are frequently required to decide between a verdict of manslaughter (or culpable homicide), entailing a maximum sentence of imprisonment for life, and a verdict of murder, entailing an automatic death sentence, subject only to review by the Secretary of State. The Commission maintain that "although the responsibility of the jury for the death sentence is now indirect, it is nevertheless a grave one and differs only in degree from that which they would bear in deciding the issue of extenuating circumstances."[54] Moreover, it might be observed that juries already discharge grave responsibilities wherever insanity is raised as a defence, a point to which the Report does not refer in this connection,[55] and under the Sentence of Death (Expectant Mothers) Act, 1931, the fact that a woman is pregnant is an extenuating circumstance which prevents the capital penalty being imposed, and this fact is left to the jury to decide.[56]

As for the argument based on tradition, it may not be inappropriate to refer to something Dr. Mannheim wrote about the Continental schemes whereby the jury is allowed to share the responsibility for determining punishment: "this is a reform which cannot be estimated as a violation of the true jury system, as the latter means not so much the exclusion of the laymen from the determination of the sentence as the exclusion of the learned judge from the verdict of guilt."[57] To object to a system of jury discretion on the ground that the jury are essentially triers of fact and are not called upon under the present system to express an opinion about a case is to adopt an ostrich-like attitude towards common experience in criminal trials. The jury by their finding do much more than decide the facts. Indeed, they are not only expected to express an opinion about the case, but they are obliged

51 §§ 575–9, pp. 201–3.
52 § 552, p. 194.
53 § 571, p. 200.
54 § 572, p. 200.
55 What effect the Commission's proposals might have upon pleas of insanity in murder trials is an interesting speculation.
56 A recent example is the case of Mrs. Winifred Trochimiuk, reported in *The Times*, February 11, 1954.
57 Dr. Hermann Mannheim, in an article entitled "Trial by Jury in Modern Continental Criminal Law," 53 L.Q.R. 99 and 388 (1937), at p. 401.

to apply the law to the facts as found, with the assistance of the guidance on this matter which is contained in the summing-up of the trial judge.

Although a line has been drawn between questions of law and fact from the point of view of the duty of the judge in summing up, no such distinction can be maintained in relation to the jury's verdict, for under the guise of being required to answer whether the accused person is guilty or not guilty the jury are left with the decision on questions of both fact and law.[58] This differentiates British jury practice from that prevailing on the Continent, where the desire to avoid leaving questions of law to the jury has led to the practice of posing to the jury a number of specific questions rather than leaving the general issue to them.[59] In the United States, moreover, so great is the fear that the judge may have an unwarranted influence over the jury that he is not usually allowed to comment on the evidence in his summing-up, but must be content with detailing the rules of law which the jury should apply in reaching their conclusion. In practice, no such separation of fact and law exists in Great Britain. Rather might one speak of there being a system of co-operation between judge and jury on both matters. This is as true of jury trials as of summary jurisdiction, where the lay magistrates are advised as to the law by their clerks.[60]

It cannot be denied that hitherto in jury trials the question of sentence has been a matter for the judge alone to decide. But there seems no reason why this should be regarded as a fundamental principle of English trials,[61] and there is no evidence to suggest that the system of co-operation already successfully operated in relation to the question of guilt might not be successfully extended to the question of sentence. This would follow from the proposed system of jury discretion.

The unanimity rule

In England it has always been the rule that the verdict of a trial jury in relation to the issue of guilt shall be unanimous, and it is not surprising, therefore, that the Commission should have

[58] This statement needs qualifying to the extent that verdicts of juries finding the accused person guilty may be set aside where it is clear that they have misunderstood or misapplied the law, even though it was correctly explained to them in the course of the summing-up. Verdicts of acquittal are not open to any such review, of course.

[59] Mannheim, *loc. cit.*, pp. 106 *et seq.*

[60] It should be observed, however, that lay magistrates are not bound to consult their clerk on points of law, but the jury are bound to listen to the judge's summing-up before finding a person guilty.

[61] Devlin J., in a lecture at University College, London, on March 4, 1954, entitled "Criminal Responsibility and Punishment," seemed to suggest that this was in fact a fundamental principle, but that it had not always been so, as prior to the nineteenth century changes in sentencing policy it was part of the function of the jury to place the crime in the appropriate category, having regard to the suitability of the penalty laid down in the various statutory provisions.

adhered to this requirement in relation to the issue of extenuating circumstances, but it is suggested that their recommendation is unlikely to prove practicable, for reasons which will appear. In Scotland, where majority verdicts are acceptable in relation to the issue of guilt, it is proposed that the majority rule should also apply to the issue of extenuation.[62]

It has been doubted whether one jury in twelve would ever agree on the question of extenuating circumstances,[63] and it must be obvious that there might be very real difficulty in adhering to the unanimity rule in relation to extenuating circumstances. Although the Commission consider that this requirement "would be a strong safeguard against any tendency to undue leniency," [64] it is suggested that the Commission have erred on the side of caution in this respect. This may well have been due to their desire not to appear to be making too revolutionary a proposal. Experience would probably show that the only course possible in order to make the jury discretion system work satisfactorily would be to make the requirement a majority requirement. This could either be a simple majority rule or a substantial majority rule, *i.e.*, seven to five might be sufficient, or it could be laid down that there must be at least nine or ten jurors in favour of extenuation. The experience of other countries is instructive in this respect.

In Belgium, where the three judges retire together with the jury to consider the question of extenuating circumstances, a simple majority eight to seven is sufficient, and it appears that no difficulty is experienced in obtaining such a decision; in fact one judge gave evidence to the effect that in his experience the decision was usually unanimous.[65] In South Africa, the jury of nine must reach a majority decision of seven to two or eight to one before the verdict is acceptable, in other words, what is required is a substantial majority verdict.[66]

In the United States, as we have seen, the verdict relating to extenuation is taken at the same time as the verdict as to guilt, and the unanimity rule is generally adhered to, but in some states provision has been made for the possibility that a jury may disagree about the penalty which is appropriate. The provisions either leave it to the judge to determine the sentence where there is a disagreement,[67] or lay down that if there is a majority in favour of mercy, the sentence shall be imprisonment for life,[68] or that the effect of

[62] § 553 (d), p. 195.
[63] Lord Goddard in the House of Lords debate, 185 H.L.Deb. c. 176. It appears that he thought the jury would have to be unanimous in favour of capital punishment before this could apply. However, in discussing the effect of a disagreement, he takes a different view.
[64] § 577, p. 202.
[65] Appendix 13, § 15, p. 477.
[66] *Ibid.*, § 31, p. 482.
[67] Missouri and Montana, according to Robert E. Knowlton, *loc. cit.*, p. 1127.
[68] Florida, according to the same source.

a disagreement is that the death sentence stands,[69] or, conversely, that in the event of disagreement of the jury the sentence must be a life sentence.[70] There appears to be a substantial number of states which adhere to the unanimity rule for both the question of guilt and the penalty.[71] The United States thus provides us with a variety of solutions to this question, but one conclusion surely emerges, that merely because the unanimity rule is adhered to in relation to the issue of guilt, it does not automatically follow that it must be applied in relation to the question of extenuating circumstances.

There is not much discussion in the Report of the Royal Commission concerning the effect of a disagreement by a jury on the question of extenuation. It is proposed that the unanimity rule should apply to a finding of extenuating circumstances. The writer at first assumed that the intention was that the decision of the jury must be unanimous one way or the other on the question of extenuation, in the same way as a trial jury must reach a unanimous verdict on the issue guilty or not guilty. This led him to assume that if there was a disagreement there would have to be a retrial on the issue of extenuation, if not on the whole case.[72] But this assumption overlooked the statement in the Report that "in the absence of such a verdict (a unanimous one in favour of extenuation) the prisoner would be sentenced to death."[73] In the House of Lords debate Lord Goddard interpreted this as meaning that if the jury failed to agree on the issue of extenuating circumstances, then the sentence of death would be passed automatically. This he described as illogical and wrong,[74] but it appears to be what the Commission propose. Such a proposal is so different from the present practice in regard to juries' verdicts that one would expect some discussion of it and further explanation in the Report, but there is none.[75] The best way out of this particular difficulty would surely be the abandonment of the unanimity requirement and the adoption of a majority rule in relation to the jury's verdict on extenuating circumstances.

[69] Eight states have adopted this rule, according to the evidence of Mr. Justice Frankfurter, quoted in the Report, Appendix 11, § 77, p. 461.

[70] Two states apply this rule: *ibid.*

[71] Twenty-four states, apparently: *ibid.*

[72] See the review of the Commission's Report, 17 M.L.R. 57, at pp. 63–4.

[73] § 553 (d), p. 195.

[74] 185 H.L.Deb. c. 176. He described it as a "curious" proposal, and went on to say that: "If the question of death or imprisonment is to depend upon the verdict of a jury, how illogical and wrong it would be to say that if the jury cannot come to a decision the more serious penalty is to follow."

[75] The idea that any result other than a new trial could follow from a disagreement was so unfamiliar to the writer that he may perhaps be pardoned for the unwarranted assumption that the Commission had intended the unanimity rule to apply both ways, instead of one way only, *i.e.*, only in relation to extenuation.

Appeal from the jury's decision on the question of extenuation

Where the jury find that there are extenuating circumstances there would, of course, be no right of appeal by the prosecution against their decision. But where the jury find no reason to exempt the prisoner from the death sentence, the question whether the defence should be given a right to appeal, and if so, on what grounds, is a matter for consideration. In the Commission's view, there should be a right of appeal on the grounds of procedural error or misdirection by the judge, or, apparently, on the ground that the jury's verdict is against the weight of the evidence.[76] They consider that if the convicted person were given a right of appeal against sentence in murder cases where the jury do not find extenuating circumstances, the Court of Criminal Appeal could be relied upon to adopt an attitude of respect towards the decisions of juries similar to that which it displays at the present time.[77]

In the United States it is the law in many jurisdictions that the jury's determination cannot be reviewed when the only error claimed is the jury's abuse of its discretion. But in seventeen states the appellate courts have been given power to modify the lower court's sentence.[78] It has been said that there are certain advantages to be obtained by this.

> "Since the jury is an untrained and inexperienced group, it seems that to prevent arbitrary action, there would be a greater need to review the jury's determination than to review that of the trial judge. Similarly, because of the constant change of personnel on juries, there is little likelihood of developing uniformity of treatment in corresponding cases." [79]

There remains one situation which is not adverted to in the Commission's Report, but which was raised by Earl Jowitt in the House of Lords debate, *viz.*, the situation where an accused person's defence to a murder charge is that he did not do the deed, and he is convicted and desires to appeal against the conviction.[80] At the second stage of the trial he might well wish to bring in evidence of character and previous convictions, but if he introduces all this evidence, will it not prejudice the appeal? It is suggested that there is no reason why this evidence should be brought forward at this stage unless the prisoner so desires, and that it should be in the discretion of the judge to decide what should be put to the jury in these circumstances. If this solution is unacceptable, it might be necessary to fall back on the South African solution, namely, confining the inquiry concerning extenuation to facts associated with the offence. It might be possible to provide that whenever there is likelihood of an appeal against conviction the inquiry concerning extenuation should be confined to facts associated

[76] This is the writer's interpretation of the meaning of § 565, p. 198.
[77] *Ibid.*
[78] Robert E. Knowlton, *loc. cit.*, pp. 1128–9.
[79] *Ibid.*, p. 1129.
[80] 185 H.L.Deb., columns 153–4.

with the offence, and evidence relating to the offender should be barred from consideration.

This suggestion, and others put forward in the course of this article, might well be considered by those whose duty it will be to decide what to do about the Commission's proposals on jury discretion. It would be wrong to dismiss the Commission's solution out of hand, and it is submitted that it would be doing them less than justice to give them the sort of one-sided examination of which the majority of the speeches in the recent House of Lords debate provide an excellent and somewhat depressing example.

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PSYCHIATRIC ASPECTS OF THE REPORT ON CAPITAL PUNISHMENT*

Although it is natural for the psychiatrist, reading through the Report of the Royal Commission on certain aspects of Capital Punishment, to devote most of his attention to the chapters on insanity and criminal responsibility, it can be said at once that every section, almost every page of this blue book, raises issues that are the proper professional concern of the psychologist, the sociologist and the psychiatrist. Indeed, the first few paragraphs of preamble and introduction present the reader with an intriguing psychological puzzle: *viz.*, why, having elected to submit the question of Capital Punishment to the attention of a Royal Commission, the Prime Minister of the period, Mr. Attlee, should have decided to hamstring the work of the Commission by excluding from the terms of reference the pressing question of abolition. The Commission was in effect compelled to proceed on an unproven assumption, that capital punishment is efficacious as a deterrent and to consider how it might be limited "without," as the introduction dryly remarks, "impairing the efficacy attributed to it." For five hundred pages we are permitted to follow the Commission's attempt to apply the processes of reason to a subject so macabre that it has defied those very processes for centuries. And for all its painstaking efforts to be impartial it is clear that from the first session the Commission was oppressed by the very problem specifically excluded from the terms of reference.

In its own innocent way the Commission registers a protest against having its hands tied behind its back; for, at the end of the very first chapter, a brief subsection is introduced dealing with the question of deterrence, of which the most important paragraph (64) is that wherein the Commission agrees with Professor Thorsten Sellin who, discussing the homicide rates in the U.S.A., informed the Commission that "Whether the death penalty is used or not or whether executions are frequent or not, both death penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty." Having entered this quiet protest, without apparently being aware that it has thereby blown its terms of reference sky-high, the Commission then proceeds to its imposed task of finding ways and means of reducing the execution rate without, however, making it so small in proportion to the number of murder convictions that the

* This article, reprinted here with some additional footnotes, has already appeared in the *Symposium on Capital Punishment* of the *British Journal of Delinquency*.

argument for deterrence would become manifestly absurd to its most convinced proponent.

It is impossible to read this early subsection without reflecting on the methods employed by Royal Commissions to test the scientific validity of "expert evidence." For a Royal Commission is after all a kind of special jury empanelled to listen to the evidence of individuals who vary widely in scientific training and in experience of the problem under investigation. For instance, the Commission felt it "could not treat lightly the considered and unanimous views" in favour of the deterrent effect of execution expressed by representatives of the police and prison services, supported as they were by some of the most distinguished judicial witnesses, including the Lord Chief Justice. Why ever not? The issue was one of deterrence, not of familiarity with prison or court manners; and to speak with authority on deterrence requires extensive acquaintance with psychological *norms*, with the effectiveness of distant anxiety as an inhibiting force, with the after-history of every variety of behaviouristic disorder, to say nothing of an expert knowledge of statistics and of statistical method. Did the police or even the judicial witnesses possess these qualifications? If not, then their evidence was, to say the least of it, merely hearsay.[1]

A similar problem arises even in the case of psychiatric witnesses. Having listened to the evidence of numerous experts on the subject of psychopathy,[2] the Commission ventured on a number of conclusions of which I shall instance only two. In paragraph 397 it is laid down that "to say of a criminal that he is a psychopath is

[1] The fact that the most weighty evidence against the deterrent effect of the death penalty was drawn from sociological sources calls for some comment. Owing to their almost exclusive concern with the diagnosis and treatment of "pathological" crime, psychiatrists have paid very little attention to the fallacies of penal "deterrence," and have left this field of general investigation to the sociologist and penal reformer. Yet the mere fact that, in spite of repeated demolition by penal reformers of the stock arguments in favour of corporal punishment, advocates of physical retribution continue to repeat their unsubstantiated and therefore prejudiced assertions, surely requires psychiatric explanation. This can only be achieved by examining the unconscious roots of the urge to punish, an explanation which leads directly to the close connection between punishment and man's unconscious sadistic urges, not to mention his unconscious guilts. Some even of the details of execution ceremonies are derived by anthropologists from earlier superstitious observances, *e.g.*, the medieval belief that blindfolding the condemned protects the executioner from the evil eye. Far-fetched as the recommendation may appear, there is some justification for including anthropological evidence when dealing with such an atavistic ritual as capital punishment. (See in this connection "The Psycho-Pathology of Flogging" by Edward Glover, Howard League for Penal Reform, London).

[2] It is not generally known that the term psychopathy, now widely accepted by psychiatrists, refers to a group of disorders which has been recognised for over a hundred years, from the time in fact when Prichard first described *moral insanity* or *imbecility*. The symptoms of the conditions include disorders of ego-structure (commonly described as character-disorders), instability and lack of restraint of emotional discharge, an incapacity to control behaviour detrimental to the community or to the subject himself, disregard of social

therefore to say something positive about him which could not automatically be assumed from his behaviour." This comes apropos of the alleged difficulty of distinguishing psychopaths from thugs, and carries with it the assumption that the psychopath does not suffer from a *disease* of the mind. But the same could be said of many persons suffering from paranoia or even from psycho-neuroses, who effectively conceal their disorder from the public gaze, yet are by professional agreement held to be suffering from diseases of the mind. Moreover, in paragraph 401 it is maintained that "there is no qualitative distinction but only a quantitative one, between the average normal individual and the psychopath." This in the face of evidence by Hill, Stafford-Clark, Taylor and Henderson (itself extensively quoted in the Report) to the opposite effect. Who is to decide this matter? Who is to give weight to the evidence? Certainly not a lay Commission [3] which with the best will in the world can only record differences by a method of nose-counting without being able to assess the qualifications of titular experts to speak with authority.

The assessment of expert evidence on psychopathy is the more important in that the conflict between the law and psychological medicine on the matter of criminal responsibility turns precisely on the capacity of the psychiatrist to distinguish delinquent psychopathy from non-pathological criminality. Except in the case of latent insanity and intermittent insanity (psychotic episodes) there is rarely any great difficulty in recognising those cases of insanity for the benefit of which the M'Naghten Rules were originally devised. And a flat ruling that cases where a state of psychosis existed shortly before, during, or shortly after the commission of the

consequences of behaviour, a striking absence of conscious remorse or conscience and as a rule a number of psycho-sexual peculiarities or perversions. These various disorders have usually manifested themselves without interruption since childhood. The seriousness of the condition can be suggested by saying that it is graver than a neurosis and not so grave as a psychosis (insanity). The reason that psychopathy is not generally recognised is that even advanced psychopaths are sometimes able to maintain an apparently normal façade and are often regarded as normal persons not only by those who come in superficial contact with them but by most judicial authorities who see them in the dock. Extensive team researches on the subject, made in this and other countries, and the use of an increasingly refined system of tests (electro-physiological, psychological and psychiatric), now enable a diagnosis to be made with reasonable certainty, and what is more important, have provided the basis of predictive examinations. In other words it is possible to set on foot a system of preventive examination by which the potential criminal psychopath can be detected and notified during an early (school) age. These facts were brought to the attention of the Royal Commission by the present writer, giving evidence on behalf of the *Institute for the Study and Treatment of Delinquency*, but were apparently disregarded. At any rate no mention was made of them in the Commission's Report (see Glover & Grygier, *British Journal of Delinquency*, Vol. II, No. 2, Oct. 1951: also Glover "On Psychopathy," Proceedings, Royal Society of Medicine (Section of Psychiatry), 1954).

[3] The Commission included, it is true, one neuro-psychiatrist but cannot on that account be rated as a scientific body entitled to make authoritative pronouncements on psychopathy.

offence should not be held as "responsible" would meet the professional requirements of doctors and at the same time satisfy the public conscience. A flat ruling is clearly called for also in the case of mental deficiency. What appears to perturb the legal mind and arouse the moral indignation of many members of the community is the possibility that a thug should "get off" the death penalty on a mistaken diagnosis of mental abnormality, an attitude incidentally which indicates that retribution rather than deterrence is still the mainspring of capital punishment, that, in fact, the writ of the *lex talionis* still runs in this country. Ever since the M'Naghten Rules were promulgated the main concern of the law has been not that they should be applied in cases of insanity, but lest they should be extended beyond the field of insanity. All this was complicated and indeed camouflaged by the fact that, owing to their being worded in the days of a "rational" psychiatry devoid of any understanding of emotional disorder, the rules opened the door to endless and fruitless discussions and interpretations of matters that are clearly outside the scope of rational psychology.[4]

Nevertheless the M'Naghten Rules did establish a precedent, the logical extension of which is to consider which disorders apart from insanity should absolve a murderer of criminal responsibility. In countries like Scotland where the concept of "diminished responsibility"[5] is recognised in law, this logical requirement is met to some extent, although, it is interesting to note, not in the case of the psychopath. And in fact, the present Commission considers that the Secretary of State should "give rather greater weight to psychopathic personality *as a ground for reprieve*" (reviewer's italics), implying thereby that psychopathy should be considered as an "extenuating circumstance" rather than a reason for waiving criminal responsibility.

Admittedly the Commission was handicapped in giving any dependable rulings on these matters by three factors: (1) that it was not qualified to give an authoritative opinion; (2) that the psychiatric evidence was not unanimous; (3) that, if the M'Naghten Rules were to be modified, such modifications would have to be expressed in general legal rather than in psychiatric terms; but

[4] For a detailed analysis and discussion of the M'Naghten Rules see Glover, "Notes on the M'Naghten Rules," *British Journal of Delinquency*, Vol. I, No. 4, April, 1951.

[5] The concept of "diminished responsibility" although opening the door to a more scientific approach to the problem of criminal responsibility is itself based on the same misconception that leads the man in the street to regard the psychopath as a normal person. Because the psychopath appears to be more normal than the insane person, his abnormal conduct when manifested is regarded as "normal abnormality" (plain bad conduct). Where criminal conduct is a direct manifestation of mental or physical disorder and is beyond voluntary control or where it can be causally traced to mental or physical disorder beyond control, the offender is criminally irresponsible however normal he may appear to behave at other times or places, or, for that matter, at the time of the offence.

it would have lent greater force to its two recommendations regarding the Rules if the Commission had added a third, *viz.*, that a technical Commission should be appointed forthwith to consider the more specific formulation of psychiatric categories or clinical entities which would automatically exclude the capital penalty or prevent its operation. For there is no question that at present psychiatric knowledge is far in advance of both legal and public opinion on the matter of criminal responsibility, as indeed the present Report clearly shows.

The inevitable consequence of working against these handicaps is a hedging of recommendations. On the one hand, it is suggested that if the Rules are to be maintained the addition put forward by the British Medical Association should be accepted, *viz.*, " that (the accused) was incapable of preventing himself from committing it (the act) " : on the other hand, the Commission suggests the abolition of the Rules leaving to the jury the task of determining on medical evidence the degree of responsibility. As, however, it is elsewhere recommended by the Commission that the jury should also determine the force of " extenuating circumstances " (not due to mental disease) justifying a reduced sentence or alternatively a reprieve, it will be seen that the second recommendation is wider than it appears. For what the jury generally regards as extenuating circumstances can be translated in psychiatric language as the amount of mental stress which would loosen an uncontrollable impulse in an otherwise reasonable person. Extenuating circumstances in fact can be classified under the heading of " traumatic states of excitation " with or without a prolonged history of otherwise normal conduct, and there is therefore every reason that some future psychiatric commission should attempt to bring order into what must otherwise be a group of " emotional variables " to be assessed according to the variable emotions of different juries. Hence, quite apart from the possibility that a legal battle may arise over the delegation of these responsibilities to a jury, we may for the moment be thankful for the small mercies contained in the Commission's first suggestion, namely, to extend the existing rules. No doubt in this extended form they would still give rise to endless confusion and debate, but at least they would permit cases of homicidal and sexual psychopathy to be considered on their psychiatric merits as cases of grave mental disorder, the main feature of which is precisely criminal irresponsibility. The truth of the matter is that punishment by execution and the responsibility of criminals are two entirely different problems, the former being a problem in social ethics, the latter an individual psychiatric problem. When brought in penal juxtaposition the issue of deterrence becomes a red herring diverting attention from the ultimate necessity of establishing precise psychiatric scales of responsibility for *all* crimes, not just the crime of murder.

There is almost no end to the inherent inconsistencies that can be brought to light by a psychiatric analysis of this Report, or perhaps one ought to say of the issue of Capital Punishment. The Commission's majority recommendation (six to five) that the statutory age-limit should be raised from eighteen to twenty-one, for instance, was based on the view that normal persons under this age are liable to instability in mental and emotional development and therefore presumably unable to stand unusual stresses. If instability of *normal* young persons is to be regarded as an adequate reason for waiving the death penalty, as most psychiatrists would agree, why should it not be so regarded in the case of *abnormal* persons of any age?; *e.g.*, psychopaths whose emotional and mental development is immensely more unstable than that of normal persons of eighteen to twenty-one and who, as can be shown by both physiological and psychological tests, have a "stress-level" corresponding to that of children under fourteen years. It is only burking this issue of responsibility to say (paragraph 200) that "these disordered cases should be considered by the Minister responsible for advising a *reprieve*."

Take again the conclusion that there are "*no rational grounds* on which women could be relieved of the liability to suffer the death penalty *while it still applies to men*" (reviewer's italics). The Report does not conceal its view that opposition to the execution of women is likely to be based on emotional (which is, of course, a euphemism for sexual) prejudice. But, as is clearly indicated by the figures for reprieve (of 135 women condemned to death in England and Scotland from 1900 to 1949, *only thirteen, one in ten, were executed, i.e.*, 90 per cent. of the sentences were commuted or respited), the argument for the deterrent effect of execution in the case of women is reduced to absurdity; and if the factor of deterrence is one of the main justifications of capital punishment, then to say that there is no rational argument for not executing women is itself irrational, or, not to put too fine a point on it, itself a sign of sexual prejudice, a fact which is in any case implicit in the wording of the Commission's conclusion, *viz.*, "while it still applies to men." And it is no use sidetracking the argument, as the Commission does, by eliminating the figures for women in coming to conclusions about deterrence. Nor does it improve matters to argue (as in paragraph 186) that amongst the women executed are those who have committed "cold-blooded and atrocious" murders, such as baby farming and slow poisoning. If the "heinous nature" of the offence is to be taken cognisance of, either in confirming or in commuting the death penalty, then the Commission's laboriously constructed argument in favour of the conclusion that "it is impracticable to find a satisfactory method of limiting the scope of capital punishment by dividing murder into degrees" falls to the ground. For if it is practicable for a responsible Minister to recommend reprieves in terms of the degree of

heinousness, it should be no more difficult for a Royal Commission to distinguish degrees of murder in the same terms.[6]

Summing up, two conclusions are irresistible. Brilliantly written and marshalled with skill, judgment and a patent regard for reason, the argument of the Report demonstrates how impossible it is to be reasonable about an emotional issue without full knowledge of unconscious sources of bias. The second conclusion is essentially a practical one, for never in the history of penological literature has such a devastating indictment of capital punishment been set before the public that is ultimately responsible for its maintenance.

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[6] Incidentally the Commission admits that "the system (of establishing degrees of murder) as now operated (in the United States) undoubtedly does much to limit the scope of capital punishment"; and since limitation of this penalty was one of the avowed aims of the Commission, it does not seem that the formidable array of legalistic arguments led by the Commission against establishing the practice in this country justifies the view that this line of approach to limitation is "chimerical." If, as the Commission states (para. 53), "the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke" it is also incumbent on the law to give statutory force to this popular discrimination of degrees, not just leave it to juries or to Home Secretaries to act as keepers of the social conscience. This would involve a psychiatric investigation of murderers as well as of the act of murder, *a contingency which curiously enough never seems to have occurred to the Commission*, whose brief and inadequate researches on the subject are confined to elementary classification of the act.

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ABOLITION OF SECRECY IN THE PREFERMENT OF INDICTMENTS

ARCHBOLD'S leading work, *Pleading, Evidence and Practice in Criminal Cases*,[1] opens with an account of what is an indictment and when it may be preferred. That this should be so very simply reflects the importance of the indictment in the law of criminal procedure. For it is the rock upon which the prosecution of every indictable offence is grounded; and generally it is the only criminal pleading which is in writing. In these circumstances it is surprising to find concealed within the rules governing the preferment of the indictment a matter of serious injustice.

There was a time when serious injustice to the accused person might have been said to have been the aim of criminal procedure. In the lawless days of the sixteenth century the Crown took steps, in accordance with the wish and approval of public opinion, to give Crown counsel the advantage in the conduct of criminal trials.[2] Thus, persons accused of treason or felony were denied the assistance of counsel and were refused a copy of the indictment.[3] The refusal of a copy of the indictment was justified on technical grounds. That justification has been explained by Holdsworth :—

> "Pleading in criminal cases was always oral. It is true that the indictment, unlike the accusation of the appellor, was written; but this written indictment was in form and in fact a presentment to the king on which the king took action . . . and, because it was in its written form a presentment to the king, the prisoner was not at common law entitled to a copy."[4]

At the commencement of the seventeenth century a practice developed, in respect of State Trials, of preparing an elaborate and detailed indictment from the evidence contained in depositions of Crown witnesses.[5] The new practice enabled pleaders to amplify the detail of each count; hence indictments increased in length. Lengthier indictments in turn increased the severity of the restrictions under which accused persons laboured, since it was impossible to memorise the whole of the indictment at the arraignment. Thus, when Sir Walter Raleigh stood upon trial for his life, he exclaimed, having heard the long indictment read to the court : "My lord, I

[1] 33rd ed., at p. 1.
[2] Holdsworth, *A History of English Law*, ix, 223.
[3] *Ibid.*, at p. 224. The rule denying the assistance of counsel to persons accused of felony was abolished in 1836: see 6 & 7 Will. 4, c. 114.
[4] *Ibid.*, iii, 615.
[5] Such depositions were read instead of the witnesses being produced.

pray you I may answer the points particularly as they are delivered, by reason of the weakness of my memory . . ." [6]

The accession of William and Mary in 1689 founded modern England: further, it set in train a more tolerant spirit in the administration of criminal law. That new spirit was reflected in the legislation of the time. For example, the preamble to the Treason Act, 1695,[7] stated: "Whereas nothing is more just and reasonable, than that persons prosecuted for high treason and misprision of treason . . . should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defence of their innocencies in such cases. . . ." By section 1 of the Act, persons indicted for high treason and misprision of treason were given the right to have a true copy of the whole indictment delivered to them *five* days at least before their trial. Later, the Treason Act, 1708,[8] widened that concession by enacting that in cases of high treason and misprision of treason a copy of the indictment should be delivered to the party indicted *ten* days before trial.

With regard to indictment for felony, changes in the law of criminal procedure were introduced very much more slowly. Until 1933 a bill of indictment for felony was normally presented to and found by the grand jury. Usually the bill related to charges into which the examining justices had already inquired, and in respect of which depositions had been taken.[9] But the deliberations of the grand jury were by no means restricted to the evidence contained in depositions. "A grand jury acted on any evidence they saw fit to admit, and could, and constantly did, act on their own knowledge." [10] A grand jury could hear the evidence of witnesses for the prosecution. Any person could appear before a grand jury with a bill or draft indictment, and witnesses to speak to the truth of the matters charged, *without notice ever having been given to the person accused.*[11] Proceedings were conducted in absolute secrecy. No person was allowed to be present in the grand jury room other than the solicitor acting for the prosecutor. The deliberations of grand juries were enshrouded in the deepest mystery. In the year 1898 an accused person attempted to pierce the veil of secrecy. One Rhodes was in custody on a charge of obtaining eggs by false pretences. Before the bill of indictment was sent to the grand jury Rhodes applied in person for leave to attend and give evidence for the defence before the grand jury. What had encouraged Rhodes to suppose that his application might be successful? The answer

[6] (1603) 2 State Trials 1, at p. 4.
[7] 7 & 8 Will. 3, c. 3. *Cf.* preamble to 7 Anne c. 22.
[8] 7 Anne, c. 21, s. 11.
[9] Although, strictly speaking, it was not necessary to have any depositions. See the observations of Goddard L.J. in *R.* v. *Chairman, County of London Quarter Sessions, ex p. Downes* [1953] 2 All E.R. 750, at p. 751.
[10] *Ibid.*
[11] Stephen, Hist. Crim. Law, i, 293.

lay in the terms of section 1 of the Criminal Evidence Act, 1898, which provided that: "Every person charged with an offence . . . shall be a competent witness *for the defence at every stage of the proceedings*." Had the section conferred upon Rhodes a right of audience before the grand jury? In the Court for Crown Cases Reserved, Lord Russell of Killowen C.J. said :—

> "It is clear that the limitation of the right of a person charged with an offence to give evidence is that he may be called for the defence, and for the defence alone. A grand jury have nothing whatever to do with the defence. Their functions are well known. They sit in private. They have to hear the evidence, or at any rate part of the evidence, for the prosecution, and to say whether in their opinion a prima facie case against the prisoner has been made out. It would be difficult to believe that the legislature intended by this section to enable a grand jury to hear evidence for the defence. Such a thing would be no less than an anomaly." [12]

The decision of a grand jury was that of the majority. Hence twenty-three jurors were empanelled so that a majority of not less than twelve might find a true bill. If the bill were rejected the words "No true Bill" were indorsed upon it. If the bill were found the words "True Bill" constituted the proper indorsement, and thereupon the "bill" became the indictment. The foreman, accompanied by one or two grand jurors, delivered the indictment to the clerk of assize, who duly caused it to be passed to the clerk of arraigns. In more recent times the form of the indictment was as follows:—

> "First count. Central Criminal Court to wit. The Jurors for our Lady the Queen upon their oath present, that, etc. . . . Second count. And the Jurors aforesaid upon their oath aforesaid do further present, that, etc. . . ."

Writing in the year 1882 Sir James Stephen said of the indictment:—

> "It is in the form of a statement upon oath by the grand jury that the prisoner committed the offence with which he is charged. This assertion in former times went a long way . . . to his conviction." [13]

It is a curious fact that from the earliest times down until 1859 there were but three enactments which brought into the law of criminal procedure any major alteration in respect of indictment for felony. First, in the year 1731 the statute 4 Geo. 2, c. 26 abolished the rule that the indictment must be in Latin. The preamble to that statute reveals that the intention of the legislature was to protect the subject ". . . from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice,

[12] In *R.* v. *Rhodes* [1899] 1 Q.B. 77, at p. 80. My thanks are due to Mr. H. J. Astell Burt for bringing this case to my notice.
[13] Stephen, Hist. Crim. Law, i, 274.

in an unknown language. . . ." Subject to that alteration, an indictment in the reign of George IV was, in all major respects, what an indictment in the time of Edward III, and probably in that of Edward I, had been.[14] Thus immediately prior to the Act of 1731, without notice to the party accused, any person was entitled to lay before a grand jury a bill or draft indictment accusing any other person of any crime whatsoever and, in the absence of the party accused, a "True Bill" could be found which would be drafted in Latin. Thereafter, the party accused would be arraigned in a foreign tongue which he might not, and in all probability did not, understand. After the coming into operation of the Act of 1731, the party accused learned at his arraignment the substance of the count or counts against him. Such was the first step away from the practice of secrecy in the preferment of indictments for felonies.

The second major alteration was not brought about until 1851, when the statute 14 & 15 Vict. c. 100 removed a mass of oppressive and highly technical rules of pleading, thereby simplifying as well as shortening the contents of indictments. Four examples suffice to show how this reform was effected :—

(i) Section 1 empowered the court to amend discrepancies between the indictment and the evidence, particularly with regard to the description of persons or things. Hence, pleaders no longer feared that the whole indictment would be held to be bad for the want of particularity in some matter of mere detail. Accordingly, the substance of each count became more obvious to the untrained eye.

(ii) Section 5 abolished the rule that written documents must be set out verbatim.

(iii) Section 18 provided that coins and banknotes might be described simply as money.

(iv) Section 9 enacted that where a person was indicted for an offence it was no longer necessary to add a count charging an attempt to commit that offence.

In consequence of those changes the party accused could more easily understand and follow the content of the indictment as it was read by the clerk of arraigns. That is why the reforms introduced by the Act of 1851 were of the utmost importance; for as yet the accused person was not entitled to a copy of the indictment in cases of felony. But, if much had been done, much still remained undone. In the view of Sir James Stephen the effect of the Act of 1851 " . . . was to leave the greater part of the law relating to indictments in a blurred half-defaced condition, like a slate the greater part of the writing on which has been half rubbed out." [15]

[14] *Ibid.*, at p. 275.

[15] *Ibid.*, at p. 286. No further change occurred with regard to the form of the indictment until the year 1915.

A third major change was introduced by the Vexatious Indictments Act, 1859,[16] which limited the right hitherto possessed by the private prosecutor to prefer before a grand jury a bill of indictment charging any offence whatsoever. The Solicitor-General (Sir H. S. Keating), in moving the second reading of the Vexatious Indictments Bill, said, that in consequence of indictments having in many cases been preferred against persons before grand juries for purposes of oppression or extortion, the Bill provided that with regard to a number of specified offences prosecutors before preferring their bills of indictment should first be required to take proceedings before magistrates, *and so give the parties accused some notice of the accusations*. As matters then stood indictments might be preferred before grand juries, and if they were truly found upon *ex parte* statements, the prosecutors were entitled to bench warrants, and the first notice the intended victims—the persons accused—received of the proceedings was from the execution of those warrants.[17] Yet the number of offences specified by the Act of 1859 was insufficiently comprehensive. Hence, Sir James Stephen gave expression to the view that "in this country anyone and everyone may accuse anyone else, behind his back and without giving him notice of his intention to do so."[18]

Thus did matters continue down until the year 1915.

The kernel of the Indictments Act, 1915,[19] is to be found in section 3, which enacts that every indictment shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge or charges. This provision, and the rules made under the Act of 1915 with regard to the form of the indictment, may be said to have "rubbed the slate clean."

But the one vital measure of reform which the Act of 1915 introduced (a measure of reform which had been introduced into the law, in the case of high treason and misprision of treason, in the year 1695) is nowhere to be found in the body of the Act. It is to be found in the First Schedule to the Act among the rules known as the Indictment Rules, 1915. Rule 13 thereof states:

> "(I) It shall be the duty of the clerk of assize, after a true bill has been found on any indictment, to supply to the accused person, *on request*, a copy of the indictment free of charge."

One cannot tell why rule 13 was not incorporated within the main body of the Act. Possibly the draftsman wanted all matters of apparent detail in his schedules. Possibly there was a conflict of

[16] 22 & 23 Vict., c. 17.
[17] Hansard (1859) Vol. 155, p. 443. For criticism of the Act, see Stephen, Hist. Crim. Law, i, 294.
[18] Stephen, Hist. Crim. Law, i, 293.
[19] 5 & 6 Geo. 5, c. 90.

opinion as to whether or not the rule should be a permanent feature of criminal procedure. The more likely reason was that Parliament intended to give to the Rule Committee [20] powers of adding to or varying the operation of the rule.

It is submitted that the operation of rule 13 should be varied by the Rule Committee.

The matter arises in this way.

After the coming into operation of the Act of 1915, secrecy in the preferment of indictments was restricted to the actual proceedings before grand juries. Grand juries were abolished, with small exceptions, by the Administration of Justice (Miscellaneous Provisions) Act, 1933.[21] The Act of 1933 contained the following provision :—

> " . . . where the person charged has been committed for trial, the bill of indictment against him may include, either *in substitution for or in addition to* counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment." [22]

Four questions arise for consideration :

1. Upon whom does responsibility rest for the correctness of an indictment ?
2. What procedure is there for obtaining the opinion of the court *before* the extra count is added ?
3. Who is to decide whether additional counts are in fact founded on facts or evidence disclosed in any examination or deposition taken before the examining justices ?
4. *What obligation is there upon the prosecution to inform the accused person of the fact that a count has been added ?*

As to 1. Upon prosecuting counsel.[23] Responsibility rests neither upon the court nor upon the police authorities.

As to 2. None.

As to 3. The Act of 1933 contains no indication as to the answer to this question. However, Hilbery J. has said :

> " The section cannot have intended to put it in the power of the prosecution to decide finally whether the indictment against the accused should include charges upon which the examining magistrates . . . have refused to commit. That construction would enable the prosecution to overrule the decision of the magistrates. . . .
>
> " Where then rests the power to decide whether particular counts charging certain offences are properly included in an indictment as : ' . . . charges founded on facts or evidence

[20] *Ibid.*, ss. 1 and 2.
[21] 23 & 24 Geo. 5, c. 36, s. 1.
[22] *Ibid.*, s. 2 (2) (i).
[23] *Per* Humphreys J. in *R.* v. *Smith and Others* [1950] 2 All E.R. 679, at p. 682.

> disclosed in any examination or depositions . . . being counts which may lawfully be joined in the same indictment' ? The answer, in our view, is plainly with the court before which the bill of indictment is preferred, in other words, the trial judge. The question in its nature is one of legal objection to the indictment. It is appropriate matter for a motion to quash the indictment." [24]

But an application to move to quash the indictment, or a particular count or counts in an indictment, is made before the arraignment. Further, unless such application is made there is no right of appeal thereon.[25] *Yet how can an accused person move before arraignment to quash that count of which he has no knowledge until after arraignment?*

As to 4. None.

This is the heart of the matter : it is a matter of serious injustice. " Secret " indictment is not, perhaps, an accurate term, having regard to the fact that an accused person has the right to request to be supplied with a copy of the indictment after the bill has been preferred and signed. However, " silent " indictment is a completely accurate term.

For how shall the accused person *know* that an extra count has been added in the bill of indictment? He may hear of it only at the arraignment : but by that time his right of appeal in the matter has been absolutely eliminated. On the other hand, even if an accused person attempts to take advantage of rule 13 by making his request for a copy of the indictment to be supplied to him, *in fact that copy indictment might not be supplied to him until twenty-four hours before the trial.*[26] That is because the bill of indictment must be both preferred and signed *before* the accused person becomes entitled to demand a copy. Moreover, the proper officer of the court cannot sign the bill until after it has been preferred. It is the prosecutor who prefers the bill. Hence, if for any reason the prosecutor delays preferment of his bill, the accused person is absolutely prevented from obtaining his copy. The truth is bitter. What incentive is there for the prosecutor to expedite matters? Why should the prosecutor prefer his bill well in advance of trial?

The matter requires remedial legislation. Rule 13 was a useful rule in the days of the grand jury. It had the simple aim and design of enabling an accused person to acquaint himself with the finding of the grand jury. It put into the hands of the accused person a copy of the indictment for his use at the trial. But grand juries have been abolished. Today, there is no body of persons having power to reject bills of indictment. There is in the hands of the prosecutor this tremendous new power of adding counts.

[24] In *R.* v. *Morry* [1945] 2 All E.R. 632, at p. 636; 31 Cr.App.R. 19, at pp. 25, 26.
[25] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (3) (*b*).
[26] See rule 2 of the Indictments (Procedure) Rules, 1933 (S.R. & O. 1933, No. 745/L 22).

There is no procedure for obtaining the opinion of the court before extra counts are added.

Further, it is for the accused person himself to take legal objection to the bill. Yet, motions to quash ought not to be made without the fullest consideration. Judges are entitled to the courtesy of not being troubled by ill-considered argument. Above all things else, the defence requires *time* in which to consider particular counts in the light of the depositions. Applications to adjourn cause great inconvenience if the date of hearing has been specially fixed. The conclusion is irresistible that what is needed is a new rule 13. A time limit should be introduced. A prosecutor should be obliged to prefer his bill, together with a copy thereof for the use of the accused person, seven days at least before the trial. Lastly, the clerk of assize or other proper officer of the court should be obliged to sign the bill and to cause the copy indictment to be delivered to the accused person five days at least before trial.

An accused person ought not to be obliged to request to be supplied with a copy of the indictment in order to learn what offences the prosecutor seeks to prove against him. But, unless and until the rules of criminal practice are altered, solicitors should *in all cases* request to be supplied with a copy of the indictment.

For who knows what it may contain?

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POLYGAMOUS MARRIAGES
AND
ENGLISH CRIMINAL LAW

ALTHOUGH many of the problems that arise in connection with polygamous marriages have been subjected to a fairly detailed study, those arising in the field of criminal law have to a considerable extent been ignored. It is proposed to examine the position of such marriages in relation to the law of bigamy, an inquiry which is complicated by uncertainties in the law of bigamy itself. The problems here turn upon the interpretation of the Offences against the Person Act, 1861, s. 57,[1] which reads :

> " Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony . . . Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

The main dispute turns upon the interpretation of the terms " being married " and " shall marry " or " second marriage," *i.e.*, the requirements pertaining to the first and second marriages respectively.

Regarding the former, it is well established that, to constitute the offence of bigamy, the first marriage must be one that will be recognised as a valid marriage by the English courts.[2] The first problem is whether a valid potentially polygamous marriage constitutes a sufficient first marriage to support an indictment for bigamy. There are at least two judicial dicta to the effect that such marriages are not sufficient. Thus, in *Harvey* v. *Farnie*, Lush L.J. stated,[3] *obiter*

> " If one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not

[1] 24 & 25 Vict. c. 100.
[2] Kenny, *Outlines of Criminal Law*, 16th ed., p. 171; Russell on *Crime*, 10th ed.; Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 32nd ed., p. 1342.
[3] (1880) 6 P.D. 35, at p. 53.

be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country."

In *R.* v. *Naguib*,[4] an Egyptian, domiciled in Egypt, who had married two women in this country, was indicted for bigamy. He pleaded that his first English marriage was invalid because at the time of its celebration he was already married to a woman in Egypt, a marriage which he had dissolved before the celebration of his second marriage. He was found guilty on the ground that he had adduced no satisfactory evidence of the existence of his Egyptian marriage. Avory J., however, expressed the view, regarding which the Court of Criminal Appeal declined to express any opinion, that [5]

> "Even if it had been properly proved that this marriage was solemnised in a country where polygamy is lawful according to the law of that country, I should still have held that it was not a valid marriage in England which could be recognised for the purpose of this indictment."

Finally, even in *Baindail* v. *Baindail*, Lord Greene M.R. stated [6]:

> "I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Mr. Pritt in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. I think it right therefore to say that, so far as I am concerned, nothing that I have said must be taken as having the slightest bearing on the question of the law of bigamy. On the question of whether a person is 'married' within the meaning of the statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question."

Despite these opinions, it is submitted that it cannot now be doubted that such a marriage will be sufficient for the purposes of the criminal law. Although there is no direct authority for this statement, it is nevertheless submitted that the decisions in *Srinivasan* v. *Srinivasan* [7] and *Baindail* v. *Baindail*, despite the cautious warnings of Lord Greene in the latter case, necessitate the conclusion, for there is scant justification for recognising potentially polygamous marriages for the purposes of the law of nullity, but withholding it for the purposes of the law of bigamy. Thus, it is a

[4] [1917] 1 K.B. 359.
[5] At p. 360.
[6] [1946] P. 122, at p. 130.
[7] [1946] P. 67.

little difficult to see the justification for holding, that an Indian Muslim or Hindu, who, having been married according to his personal law in India, could " marry " again in this country without being subject to the English law of bigamy, whereas an Indian Christian, who, having been married in India, attempted to " marry " again here would be guilty of bigamy, whilst, in both cases their Indian marriages would have the effect of rendering null their English " marriage." In both cases a man, being married, is attempting to marry again in this country, and whether their personal law sanctions polygamy or not hardly affects the question from the point of view of English criminal law.

Although at least some modern writers support this contention,[8] Morris [9] would appear to be of the opinion that there could be no prosecution for bigamy in such cases. He admits, however, that,[10]

> " At first sight it looks illogical to treat the first polygamous marriage as valid for the purpose of invalidating the second monogamous ceremony, and yet as not giving rise to a prosecuting for bigamy; or to treat the second monogamous ceremony as constituting a marriage void for bigamy, but not a bigamous marriage ";

but continues,

> " But the dilemma disappears if we remember that the same words ' husband ' and ' wife ' are used in different senses in the Matrimonial Causes Act, 1950, and in the Administration of Estates Act, 1925; in the former case they do not include the spouses of a polygamous marriage, in the latter case they probably do. Moreover, the same verb ' to marry ' is used in two different senses in the same sentence of section 57 of the Offences against the Person Act, 1861."

With great respect it is submitted that this does not avoid the logical difficulty. Even if we assume that the words " husband " and " wife " are used in different senses in the Matrimonial Causes Act, and the Administration of Estates Act, it is difficult to see what bearing that has upon the meaning of the term " being married " in the Offences against the Person Act. Equally, it is true that merely because the verb " to marry " is used in two different senses in the Offences against the Person Act, s. 57, does not prove that " being married " means only being a party to a *de jure* monogamous marriage. It is, therefore, respectfully submitted that the logical dilemma remains and that in view of this, a potentially, or even a *de jure*, polygamous marriage should be regarded as sufficient to support an indictment for bigamy.

[8] Kenny, *Outlines of Criminal Law*, 16th ed., p. 171; Russell on *Crime*, 10th ed., p. 856; *contra*, Archbold, *Pleading, Practice and Evidence in Criminal Cases*, 32nd ed., p. 1342.

[9] " The Recognition of Polygamous Marriages in English Law " in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 287, at pp. 316–8; (1953) 66 H.L.R. 961; see also his *Cases on Private International Law*, 2nd ed. (1951), p. 92.

[10] At p. 318.

Thus far we have only considered such marriages on the assumption that they were celebrated abroad. We must now turn to consider the position that arises where, *e.g.*, a Hindu or Muslim, domiciled in India, celebrates his first marriage in this country. There would appear to be two distinct cases to be considered here. There are firstly those where there has been no contravention of the Marriage Act. In this case no particular difficulties arise. If it be assumed that the "nature of the marriage" be determined by the *lex loci celebrationis*, then any marriage lawfully celebrated in this country would be a *de jure* monogamous marriage, and clearly sufficient to constitute a first marriage for the purposes of the law of bigamy. If, on the other hand, it be assumed that the "nature of the marriage" is determined by the *lex domicilii* of the husband, then clearly the marriage, although celebrated here, could nevertheless be potentially polygamous. If, however, it be admitted that a valid potentially polygamous marriage, if celebrated abroad, be a sufficient first marriage, then clearly such a marriage, if celebrated in this country, should be sufficient. Thus, on either view, where the marriage is celebrated in this country, whether potentially polygamous or not, it will be a sufficient first marriage for the purposes of the criminal law.

Where, however, the marriage has been celebrated in this country according to religious rites in contravention of the provisions of the Marriage Act, difficulties arise. The question is essentially whether a marriage so celebrated is a valid marriage or not; for if valid, it will clearly be a sufficient first marriage. This problem turns upon the interpretation of the Marriage Act. The Act lays down certain formalities regarding the celebration of marriages in this country, but it only provides for the nullity of marriages celebrated in contravention of these provisions in those cases where the parties "knowingly and wilfully" contravene them.[11] This would appear to lead to the conclusion that in those cases where the provisions of the Act are not knowingly and wilfully contravened, the validity of the marriage must be determined by common law, always assuming, of course, that the provisions of the Act regarding age and the prohibited degrees are in no way contravened.

It follows from this, since English common law, as interpreted by the House of Lords in *R.* v. *Millis*,[12] requires the presence of an ordained priest as necessary to the validity of common law marriages, that any marriage celebrated in contravention of the provisions of the Marriage Act, in circumstances under which there is no wilful contravention, will be a valid marriage provided that consent *per verba de praesenti* is declared before an ordained priest.

[11] s. 49.
[12] (1843) 10 Cl. & F. 534.

It may be remarked that Russell has expressed the opinion that [13]

> "Owing to the provisions of the Marriage Acts, 1823–1949, proof of a common law marriage in England is not sufficient for the purposes of an indictment for the law of bigamy."

With respect it is a little difficult to see the justification for this opinion, and, indeed, no authority is cited to support it. If, as we submit, the validity of a marriage celebrated in this country in contravention of the provisions of the Marriage Act, where there has been no wilful contravention, is determined by common law, why should not a valid common law marriage be a sufficient first marriage for the purpose of an indictment for bigamy? Thus it seems reasonably clear that a valid common law marriage celebrated abroad will be a sufficient first marriage, and if this be so, what justification is there for distinguishing between the two cases—in both cases the marriage is a valid common law marriage.

The essence of the position regarding the first marriage is that it must be a valid marriage—whether there has been contravention of the Marriage Act or not is immaterial. It is therefore respectfully submitted that a valid common law marriage will, in fact, be sufficient to support an indictment for bigamy. This, however, is of course of little assistance in those cases where there is an attempt to celebrate a marriage in this country according to Muslim or Hindu rites, since such "marriages" would be invalid by common law on the ground of the absence of an ordained priest.

This conclusion, however, would appear to be opposed by *Re the Estate of Abdul Belshar Majid*,[14] in which a Muslim, domiciled abroad in a country where Islamic law was applied to him as his personal law, married *two* domiciled English women according to Muslim rites in this country, and yet it was apparently assumed that *both* the marriages were valid. The case cannot, however, be regarded as decisive for this purpose. The matter was settled out of court, and although Beckett [15] has pointed out that the omission by the court to inform the Treasury Solicitor, to enable the Crown to claim the estate of the deceased as *bona vacantia*, implies that the marriages were regarded as valid, it surely remains true that a decision by implication cannot be regarded as of great weight. Morris [16] has, however, argued that even if the omission to inform the Treasury Solicitor were deliberate, it does not necessarily imply that the marriages were regarded as valid, on the ground that,

> "the husband died domiciled in Persia, and therefore the English court was only concerned to discover the individuals

[13] Russell on *Crime*, 10th ed. (1950), p. 856; Roscoe, *Criminal Evidence*, 16th ed. (1952), p. 408.
[14] *The Times* (1926), December 16 and 18; (1927), January 14 and 18.
[15] "Recognition of Polygamous Marriages under English Law," 48 L.Q.R. 341, at p. 348.
[16] *Op. cit.*, at p. 304.

> who by Persian law were entitled to the property. If by Persian law the estate devolved on individuals who had gone through a ceremony in England, and if the English court gave effect to Persian law as the law of the domicile, it does not follow that the English court recognised the ceremony as a marriage or the person concerned as a wife."

This argument depends upon the adoption of the theory that the "incidental question" is determined by that legal system which has been held to govern "the main issue." Whether this particular argument be adopted or not, and there is certainly no evidence that it even occurred to the court, the fact remains that the decision cannot be regarded as of very great weight.

Sir Eric Beckett,[17] on the other hand, argued in favour of the validity of such marriages, on the ground that, just as English marriages celebrated abroad may be valid as common law marriages, although not valid by the *lex loci celebrationis*, so, a marriage celebrated in this country between Muslims according to Muslim rites may be considered valid although not celebrated according to the requirements of English law. This argument, however, as Morris[18] has pointed out, confuses the fact that in those cases involving the validity of common law marriages the *lex fori* and the *lex loci celebrationis* were not the same, whereas in the case of the validity of a Muslim marriage celebrated in this country, coming before the English court, they would be.

It is therefore respectfully submitted that any marriage celebrated in this country in contravention of the provisions of the Marriage Act, unless valid as a common law marriage, is invalid, and therefore incapable of being maintained as a sufficient first marriage for the purposes of bigamy.

If we turn to consider the case of the second marriage, we must again distinguish between those cases where it was celebrated in this country, and those where it was celebrated abroad. Where the marriage in question has been celebrated in this country, the first point that needs to be mentioned is the question as to whether the mere fact that a man's personal law sanctions polygamy renders him immune from prosecution for bigamy if he marries a second time in this country. It would appear to have been the opinion of Darling J. in the *Hammersmith Marriage* case[19] that such a person could not be convicted of bigamy. Thus his Lordship stated[20]:

> "Should Dr. Mir-Anwarudin succeed in his contention here, he might demand of this registrar four certificates at once, and with the sanction of them might proceed to marry as many English women of the Christian faith; yet it is plain that not one of such unions could give the woman espoused the status

[17] *Op. cit.*, at p. 366.
[18] *Op. cit.*, at p. 307.
[19] *R.* v. *Superintendent-Registrar of Marriages, Hammersmith, ex p. Mir-Anwarudin* [1917] 1 K.B. 634.
[20] At p. 650.

> of wife according to English law, for if it did those certificates would permit of polygamy, which our law forbids; they would indeed amount to licences to commit three separate felonies."

This, it is respectfully submitted, is erroneous. The Offences against the Person Act, which admittedly applies to all persons within the territorial jurisdiction of the English courts, simply provides that any person who "being married, shall marry," is guilty of felony, and there is no exception in favour of those persons whose personal law sanctions polygamy. This is made quite clear by the actual decision in *R.* v. *Naguib*, where the prisoner, although a Muslim domiciled in Egypt, was found guilty of bigamy, having married in this country, being already married. It would seem logically to follow that, *e.g.*, a Hindu or Muslim, who having celebrated a valid, although potentially polygamous marriage, contracted a second marriage in this country, would be guilty of bigamy.

Morris,[21] however, argues that the question, where the second marriage is celebrated according to the normal English ceremonies,

> "is academic, because he (the husband) would be unable to obtain a certificate for the English ceremony unless he stated in his notice of marriage that he was an unmarried man and that he knew of no impediment to the marriage: and if he made a false declaration, he could be convicted of an offence under section 3 of the Perjury Act, 1911, for since *Baindail* v. *Baindail* the prior polygamous marriage would clearly be an impediment. (The punishment for this offence is the same as that for bigamy.) It is one thing for a polygamist to marry two wives, and quite another thing for him to pose as an unmarried man. It is therefore immaterial in practice whether he could be convicted of bigamy in these circumstances, but it is submitted that he could not."

It may be remarked that it is by no means self-evident that a conviction for perjury could, on Morris's own argument, be obtained in such cases. If the husband is not "married" for the purposes of the Offences against the Person Act, what justification is there for holding that he is guilty of perjury if he so describes himself for the purpose of obtaining a marriage certificate. It is surely carrying things rather far to argue that a criminal court should hold a man to be married for the purposes of perjury but unmarried for the purposes of bigamy.

Morris, however, is of opinion that no prosecution would lie in those cases where the second marriage is celebrated in this country in compliance with the provisions of the Marriage Act. The argument by which he reaches this conclusion has already been noted above, and it is respectfully submitted that it does not in fact involve the conclusion for which Morris contends. It is therefore respectfully submitted that a conviction for bigamy will lie in those

[21] *Op. cit.*, at p. 317.

cases where a Hindu or Muslim, who being married, marries again in this country, using the ordinary English civil ceremonies.

Quite apart from the above, however, this approach leaves untouched the problem arising where the second marriage has been "celebrated" in this country by religious rites in contravention of the formalities prescribed by the Marriage Act. In such cases there could be no question of a prosecution for perjury, and yet it will be submitted that nevertheless a prosecution for bigamy would lie. We must therefore examine the requirements relating to the second marriage.

The earlier attitude of the courts towards this problem seems clearly to have been that the second marriage had, apart from its bigamous character, to be a valid marriage. Thus, in *R.* v. *Drake*,[22] Parke J. held that a second marriage could not be regarded as bigamous if there was insufficient evidence that the banns had been published with the correct name of the woman, saying [23]

> "if the banns had been published in a name that was not her own, and which she had never gone by, the marriage would be invalid."

Similarly, in *R.* v. *Graham*,[24] Alderson B. held that where the second marriage had been celebrated at Gretna Green in Scotland, it could not be regarded as bigamous if there was insufficient evidence as to its validity.

Even as late as 1860 in *Burt* v. *Burt*, the court stated [25]:

> "There must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage."

In this case a woman petitioned for divorce on the grounds of bigamy, and adultery coupled with bigamy. The second marriage was celebrated in Australia according to the forms of the kirk of Scotland, but there was no evidence as to the validity of such a form by the law in force in Australia at that time. On this ground the court refused to grant a divorce, but did so on the ground of adultery coupled with desertion.

Finally, in *R.* v. *Fanning*,[26] the second marriage was celebrated in Ireland by a Roman Catholic priest, contrary to 9 Geo. 2, c. 13, which forbade the solemnisation by Roman Catholic priests of marriage to which either party was a Protestant, although one of the parties was a Protestant. The Court of Criminal Appeal for

[22] (1830) 1 Lewin 25. It should be noted that today the mere fact that a false name had been used would not necessarily be considered as invalidating the marriage. Thus in *R.* v. *Lamb* (1934) 50 T.L.R. 310, a false name was given with the knowledge of both parties in the notice to the Superintendent-Registrar, and yet Lord Hewart C.J., following *Re Rutter* (1907) 24 T.L.R. 12 and *Plummer* v. *Plummer* (1917) 33 T.L.R. 417, held that such a marriage was a sufficient first marriage for the purposes of bigamy.

[23] At p. 26.

[24] (1837) 2 Lewin 97.

[25] (1860) 2 L.T. 439.

[26] (1866) 17 Ir.C.L.R. 289.

Ireland held, by a majority, that the second marriage was not bigamous, on the ground that it was not a valid marriage.

On the other hand, there is another line of decisions which is to the contrary effect. Thus, in *R.* v. *Allison*,[27] Chambre J. held a marriage to be bigamous, although it had been celebrated in a false name, and although the only evidence of its celebration was that of a witness, there being no evidence of registration, licence, or publication of banns. Similarly, in *R.* v. *Penson*,[28] the second marriage had been celebrated in a false name, but Gurney B. held that it was nevertheless bigamous, saying [29] :

> "I am of opinion, that parties cannot be allowed to evade the punishment for an offence, by contracting a concertedly invalid marriage."

Again, in *R.* v. *Brawn*,[30] the second marriage was between a woman and her deceased sister's husband, which at that time was an invalid marriage. Lord Denman C.J. held that it was nevertheless bigamous, saying [31] :

> "I am of the opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman having a husband then alive, has committed the crime of bigamy by doing all that in her power lay by entering into marriage with another man."

Finally, in *R.* v. *Allen*,[32] the second marriage was celebrated between a man and the niece of his deceased wife. Cockburn C.J. nevertheless held the marriage to be bigamous despite the impediment of affinity between the parties, following *R.* v. *Brawn* and *R.* v. *Penson*.

The manner in which these two lines of cases have been reconciled appears from the ground upon which Christian J. distinguished *R.* v. *Brawn* in *R.* v. *Fanning*, and Cockburn C.J. distinguished *R.* v. *Fanning* in *R.* v. *Allen*.

Thus, in *R.* v. *Fanning*, Christian J. stated [33] :

> "In *Brawn's Case* the ceremony was complete—perfect in everything which the law required; and the only thing which prevented it being a valid marriage was the circumstance that the parties were within the prohibited degrees; but in the case

[27] (1806) R. & R. 109.
[28] (1832) 5 C. & P. 412.
[29] At p. 412.
[30] (1843) 1 C. & K. 144.
[31] At p. 145.
[32] (1872) 41 L.J.M.C. 97.
[33] At p. 342.

before us the defect is in the ceremony : there is no ceremony at all; or there is worse than no ceremony, because there is that which is condemned to nullity by a law of public policy."

In *R.* v. *Allen*, Cockburn C.J., dissented from the judgment in *R.* v. *Fanning* stating [34] :

> " After giving our best consideration to the reasoning of the learned judges who constituted the majority of that Court, we find ourselves unable to concur with them, being unanimously of the opinion that the view taken by the four dissentient judges was the right one ";

Nevertheless he felt it necessary to distinguish it, saying that there was [35]

> " this difference between the case of *The Queen* v. *Fanning* and the present, that the form of marriage there resorted to was one which, independently of the bigamous character of the marriage, was, by reason of the statutory prohibition, inapplicable to the special circumstances of the parties, and ineffectual to create a valid marriage, whereas in the case before us, independently of the incapacity, the form would have been good and binding in law."

This method of reconciling the decisions leads to the conclusion that although the second marriage need not be a valid marriage, apart, of course, from its bigamous character, yet it must be celebrated by a form which the law of the place of celebration recognises as a ceremony of marriage.

Thus, to quote again from the judgment of Cockburn C.J. in *R.* v. *Allen* [36] :

> " It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through *a form of marriage known to and recognised by the law as capable of producing a valid marriage*, for the purpose of a pretended and fictitious marriage, the case is not less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties or make the form of marriage resorted to specially inapplicable to their individual case."

Similarly, in *R.* v. *Robinson*,[37] Lord Hewart C.J. upheld a conviction for bigamy where the second marriage had been celebrated in

[34] At p. 98.

[35] At p. 99.

[36] At p. 101. This would appear to be the position taken up by most textbook writers. Thus Kenny states, at p. 172: " The second marriage (the alleged crime) must have been in a form *recognised* by the law of the place where it was celebrated "; Russell, at p. 881, states: " The form and ceremony gone through must be such as is known to and *recognised* by the law as capable of producing a valid marriage "; whilst finally Stephen, at p. 277, states: " The word ' marries ' means goes through a form of marriage which the law of the place where such form is used *recognises* as binding."

[37] [1938] 1 All E.R. 301.

Scotland by a declaration before witnesses, the parties having been resident in Scotland for only one day, whereas by the then Scottish law [38] twenty-one days' residence was required before a marriage could be validly celebrated in that form. His Lordship merely stated,[39]

> "The matter has really never been beyond doubt. It has not only been clear since 1872, but it was also made clear in the earlier case of *R.* v. *Brawn*."

but quoted the recorder as saying,

> "The form adopted here quite clearly *was recognised by the law as capable of producing a valid marriage*, and the only reason it turned out to be an invalid marriage was because the accused had failed to comply with this condition precedent, and the same thing might have happened between parties within the prohibitive degrees of consanguinity."

The main problem raised here is the meaning to be attached to the term recognition, *i.e.*, which ceremonies of marriage are "recognised" by English law. It has already been pointed out that disregard of the provisions of the Marriage Act will only result in the nullity of marriage if they have been "knowingly and wilfully" contravened. Where there has been no such contravention the validity of such marriages falls to be determined by the common law. By the common law, at least as interpreted by the House of Lords in *R.* v. *Millis*, the only form which was necessary to the validity of a marriage was the declaration of consent *per verba de praesenti* before an ordained priest. In view of this it seems a little difficult to see just where the line is to be drawn distinguishing those forms of marriage which are recognised and those which are not. It can hardly be contended that the presence of an ordained priest is the criterion to be adopted, for apart from the fact that the presence of such a person is merely necessary to establish the validity of the marriage, and it is admitted that the marriage need not be valid to be capable of being bigamous, English law recognises forms of marriage in which the presence of a priest is unnecessary.

We are, therefore, left with the declaration of consent *per verba de praesenti*, and must conclude that any marriage which involves the declaration of such consent is in a form "recognised by English law."

In view of this we may inquire whether, in those cases where the second marriage has been celebrated in this country by Hindu or Islamic religious rites, in contravention of the provisions of the Marriage Act, it will nevertheless be capable of being bigamous. Prima facie it would appear that they may be so considered, at least

[38] 19 & 20 Vict. c. 96, repealed by the Marriage (Scotland) Act, 1939, s. 5 (2 & 3 Geo. 6, c. 34), and the Marriage (Scotland) Act, 1939 (Commencement) Order, 1940.

[39] At p. 302.

to the extent to which they involve consent expressed *per verba de praesenti*.

It may, however, be argued that the consent necessary to the creation of a valid common law marriage must be to the creation of the status of husband and wife, as understood in English law, and since according to some writers the status of husband and wife in a polygamous marriage differs from that as understood in English law, consent to such a status cannot be regarded as sufficient to constitute the crime of bigamy. This argument, of course, is based upon the postulate that the status of marriage involved in a *de jure* monogamous marriage differs from that involved in a potentially polygamous marriage, a proposition which we have elsewhere submitted cannot be substantiated. It may further be remarked that if it be admitted that a potentially or *de jure* polygamous marriage be a sufficient first marriage for this purpose, then there is little justification for holding that consent to such a marriage is not sufficient as a second marriage.

In any case there is authority for our contention to be found in *R.* v. *Rahman*,[40] in which the defendant was charged with an offence under the Marriage Act, 1836, s. 39,[41] which provided that any person who shall

> " knowingly and willingly solemnise any marriage in England, except by special licence, in any place other than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid shall be guilty of a felony. . . ."

The defendant was a Muslim, and the marriage that he purported to solemnise was between a Muslim, who was already married to another woman in India, and an Englishwoman who had become converted to Islam. The ceremony took place in a private house, and was performed according to Islamic rites. The defence raised was that the marriage was a Muslim marriage, and therefore being potentially polygamous was not recognised in the English courts. Streatfeild J. held that the performance in England of the usual Muslim rites was a solemnisation of " marriage " within the meaning of the Marriage Act. The grounds upon which he reached this decision is very significant for our purposes. Thus, his Lordship held that,[42]

> " I construe the word ' marriage ' in section 39 of the Act of 1836 as having the same meaning as it does in the Offences against the Person Act, 1861, s. 57."

Further, after citing the terms of section 57 of the Offences against the Person Act, he argued.

> " Clearly, the words ' being married ' means ' being lawfully

[40] [1949] 2 All E.R. 165.
[41] 6 & 7 Will. 4, c. 76; see now 12 & 13 Geo. 6, c. 75, s. 25 (2).
[42] At p. 167.

> married,' and the words ' shall marry ' and ' second marriage ' refer to a marriage which is not only unlawful and void but which in itself gives rise to a criminal offence, and therefore must mean a purported marriage or form of marriage. It matters not whether the bigamous marriage takes place in a registry office or whether it takes place in a church or a synagogue or other place of worship. It seems clear, therefore, that in that penal Act the word ' marriage ' means a purported marriage, and although that Act is of later date than the one I am construing, that is of assistance in determining the meaning of the words ' solemnise any marriage in England ' in the Act of 1836."

Thus, his Lordship was clearly of the opinion that the celebration of a marriage in this country in accordance with the usual Islamic rites would be a sufficient second marriage for the purposes of the law of bigamy, despite the fact that as a ceremony it would have been totally ineffective to create the status of marriage.

A further conclusion follows from this decision. If the celebration of a marriage according to Muslim rites in this country is an " unlawful solemnisation of marriage," then to hold that such a ceremony is not a sufficient second " marriage " for the purposes of the law of bigamy is in effect to hold that a person who contravenes the provisions of the Marriage Act is exempt from the application of the law of bigamy, *i.e.*, a person by breaking the law with regard to the formation of marriage is in a better position regarding the application to him of the law of bigamy, than one who complies with it, which, as Euclid would say, is absurd. Thus, for example, there can be little doubt that the defendants in *Srinivasan* v. *Srinivasan* and *Baindail* v. *Baindail* were guilty of bigamy (assuming, of course, as we contend, that their first marriage would have been sufficient for this purpose), in that they, being married, attempted to marry again in this country by means of the ordinary English civil ceremonies, yet it would surely be a trifle absurd to argue that they would not have been guilty of bigamy had they persuaded their second " wives " to " marry " them according to Hindu religious rites without complying with the formalities of the Marriage Act.

Authority may also be found in *Re Ullee*,[43] in which a Muslim, domiciled in India, who had already contracted at least one marriage there, came to this country and married *two* English wives by Islamic ceremonies. The first English wife claimed the custody of the children she had borne him. She argued that her marriage was invalid and that, therefore, the children were illegitimate. Chitty J. held that in fact it was not necessary for him to decide the question as to whether the children were legitimate or not since even if the children were illegitimate yet the mother was not necessarily entitled to their custody, at least not if they were over seven

[43] (1885) 53 L.T. 711.

years of age, as they in fact were. His Lordship nevertheless stated that,[44]

> "The marriage was undoubtedly invalid according to the English law. The Nawab was already married, and had already at least one wife in his own country, when the ceremony of marriage according to Mahommedan rites was performed with the appellant in this country."

It is respectfully submitted that if his Lordship was of opinion that the second marriage was invalidated by the first, then the only logical conclusion is that it was also bigamous. The first marriage was clearly potentially polygamous and yet, in his Lordship's opinion, it invalidated the first of the marriages celebrated in this country. It clearly did not do so by Islamic law, and therefore the invalidity can only have been derived from English law. This clearly means that his Lordship was of opinion, not only that the Indian marriage was a "marriage" within the meaning of English law, but also that the second ceremony was equally a purported marriage so far as English law was concerned.

It is therefore respectfully submitted that the decisions in *R.* v. *Rahman* and *Re Ullee* clearly necessitate the conclusion that any ceremony, whether defective as a ceremony to create the status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy.

We must now turn to examine those cases where the second marriage has been celebrated abroad. In these cases the Offences against the Person Act distinguishes between British subjects and non-British subjects, by providing that in the case of British subjects a second marriage will be bigamous, from the point of view of English criminal law, wherever it is celebrated, whilst in the case of a non-British subject he will not be guilty of bigamy, so far as the English courts are concerned if his second marriage is celebrated elsewhere than in England or Ireland. Thus, in *R.* v. *Russell*,[45] the Court of the Lord High Steward held a second marriage celebrated in America by a British subject, after his first marriage had been dissolved in Nevada (under circumstances in which the English courts would not recognise the American divorce decree, because the court granting it had not possessed jurisdiction in the international sense) to be bigamous.

Although the Act distinguishes for this purpose between British subjects and non-British subjects, it draws no distinction between those British subjects whose personal law sanctions polygamy, and those whose personal law does not. It would thus appear that any British subject, even though by his personal law he is entitled to take additional wives if he so desires, who married a second time, will technically be guilty of bigamy. This interpretation, in so far as it relates to the case where the second marriage is celebrated

[44] At p. 712.
[45] [1901] A.C. 446.

in a country whose marriage law does not permit polygamy, may be regarded as unobjectionable, but it is submitted that in so far as it relates to the case where the second marriage is celebrated by a person whose personal law sanctions polygamy, in a country whose matrimonial law also sanctions polygamy it is entirely devoid of any justification whatsoever. Such a person has committed no crime by his personal law—a law which is applied to him as a subject of Her Majesty, in one of Her Majesty's overseas territories—nor by the law of the place where the second marriage was celebrated, which may well be, indeed is most likely to be, also a British possession, and to so interpret the Act as to render a large number of Her Majesty's subjects criminals in this country when they are not criminals in their own is surely to [46]

> "fly in the face of common sense, good manners and the ordered system of tolerance upon which the Empire is based."

Thus, Morris has stated,[47]

> "if a Hindu domiciled in India lawfully married two Indian wives there, it is inconceivable that he would be prosecuted for bigamy in England, even though he might appear to be technically within the section : for his conduct was lawful by his personal law and by the law of the place where he acted, and there would be strong reasons of a public nature against a prosecution."

Cheshire has remarked that "what is shocking is suspect," [48] and we must therefore re-examine the interpretation of the section in so far as it applies to such cases. Again, the crux of the matter turns upon the interpretation of the term "marries." We have already seen this term possesses a rather special connotation in that it includes the performance of ceremonies which, for one reason or another, cannot create the status of marriage. Indeed, since by English law the existence of one marriage renders void any subsequent marriage, it follows, as was pointed out by Lord Denman C.J. in *R.* v. *Brawn*, that the subsequent marriage must necessarily be void.

It is surely possible to argue from this that the term "marries," in the Offences against the Person Act, only includes the performance of ceremonies which would, in fact, be incapable of creating the status of marriage, on this ground, *i.e.*, quite apart from any other grounds which would invalidate the purported second marriage. In the case of a Hindu or Muslim who lawfully marries

[46] *Per* Barnard J. in *Srinivasan* v. *Srinivasan*, at p. 70.

[47] *Op. cit.*, at p. 317. It may be remarked that this opinion is a little difficult to reconcile with Morris's view that where the second marriage is celebrated in this country no indictment for bigamy would lie. If a potentially polygamous marriage is not a sufficient first marriage to support the indictment, what justification is there for assuming that two such marriages would support an indictment, or at least bring the parties technically within the terms of the statute.

[48] *Private International Law*, 4th ed. (1952), p. 496.

two wives in India, the second marriage is, in every respect, a perfectly valid marriage, both by his personal law and by the *lex loci celebrationis*, even despite the existence of the first marriage. Thus, it is reasonable to argue in such a case, that since the second marriage would be in all respect valid, it could not be considered bigamous. It is therefore respectfully submitted that a British subject whose personal law sanctions polygamy, and who celebrates his second marriage in a country whose matrimonial law also sanctions polygamy, cannot be indicted for bigamy in this country.

We may perhaps summarise our conclusions as follows :

(1) A valid potentially polygamous marriage will be a sufficient first marriage for the purposes of bigamy but a marriage celebrated in this country by religious rites in contravention of the Marriage Act will not, unless it be a valid common law marriage, be valid, and therefore will not be a sufficient marriage for this purpose.

(2) Any second marriage celebrated in this country will be bigamous, even though celebrated by religious rites in contravention of the Marriage Act, but a second marriage celebrated abroad by a British subject whose personal law sanctions polygamy in a country whose marriage law likewise sanctions polygamy will not be bigamous.

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NOTES OF CASES

Damages for Wrongful Expulsion from a Trade Union

A member of a trade union who is wrongfully expelled from his union can obtain a declaration and an injunction against the union but he cannot recover damages. This conclusion—surprising, at least at first sight—was reached by the Court of Appeal in 1915 in *Kelly* v. *N.S.O.P.A.* (1915) 113 L.T. 1055. It has now been affirmed by a majority decision of the Court of Appeal (Evershed M.R. and Jenkins L.J., Denning L.J. dissenting) in the case of *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687.

The arguments by which it was sought to persuade the Court of Appeal to distinguish *Kelly's* case or to overrule it may be summarised as follows :—

(1) That it was inconsistent with the later decision of the House of Lords in *Amalgamated Society of Carpenters* v. *Braithwaite* [1922] 2 A.C. 440.

(2) That it was doubted by Scrutton L.J. in *R.* v. *Cheshire County Court Judge, ex p. Malone* [1921] 2 K.B. 694, 709.

(3) That the effect of section 82 (1) of the Law of Property Act, 1925, has destroyed the *ratio decidendi* of *Kelly's* case.

(4) That the effect of *Taff Vale Ry.* v. *A.S.R.S.* [1901] A.C. 426, and *N.U.G.W.* v. *Gillian* [1946] K.B. 81, is to recognise that a trade union is an entity distinct from the members composing it, and that *Kelly's* case failed to recognise this and thus was based on a fundamental misconception.

A word may be said about each of the above arguments.

(1) The majority of the Court of Appeal dismissed *Braithwaite's* case as irrelevant since it did not deal at all with the issue of damages but merely reaffirmed the right of an expelled member to claim a declaration and an injunction. The House of Lords also held in that case that such a proceeding was not precluded by section 4 of the Trade Union Act, 1871, as being a mode of directly enforcing an agreement of the kind specified in that section.

(2) Scrutton L.J.'s doubts were accorded less weight than might otherwise have been the case, since they were apparently based upon a misconception as to the true *ratio* of *Kelly's* case. Scrutton L.J. seems to have thought that the basis of that decision was that the expelled member was seeking to enforce a contract made between the plaintiff and himself (and others), and that no action would lie to recover damages in such circumstances. Scrutton L.J. also thought that there was an inconsistency in allowing a declaration and an injunction, but refusing to award damages against the union.

The true *ratio* of *Kelly's* case will be referred to below under (4), and as to the second point, both the Master of the Rolls and Jenkins L.J. thought there was nothing inconsistent in refusing damages, provided, of course, the fundamental premise remained, that the union is not capable of being treated for this purpose as an entity distinct from the body of members composing it.

(3) This section, which provides that any agreement entered into by a person with himself and other persons shall be enforceable as if made with those other persons alone, is clearly only relevant if Scrutton L.J.'s view of the *ratio decidendi* of *Kelly's* case was the correct one. Having rejected this view, the majority of the Court of Appeal dismissed section 82 as having nothing to do with the case; nor, indeed, did Denning L.J., in his dissenting judgment, seek to place any reliance upon or even to refer to it.

(4) The real kernel of the argument rested upon this contention, and it was upon his acceptance of this contention that Denning L.J. based his strong dissenting judgment. Before examining this argument, however, it is desirable to interpose at this stage the basis of the decision in *Kelly's* case.

That decision was seemingly founded on two points which are perhaps no more than different aspects of the same point. The case proceeded on the fundamental assumption that a trade union is not a legal person distinct from its members, and that an action based on wrongful expulsion is a claim for breach of a contract between the member and all the other members. This contract is made when the member enters the union and is upon the terms of the rules governing the union. Where, therefore, the member is wrongfully expelled either by a committee (as in *Kelly's* case) or an official (as in *Bonsor's* case) the claim, if any, against the union for damages must be in respect of a breach of that contract. To succeed in such a claim it must be shown that the committee or official acted with the express or implied authority of the body of members (excluding the plaintiff himself). It is at this stage that the plaintiff finds himself impaled on one or other of the horns of a dilemma. For if the committee acted without authority then the union cannot in any event be liable. In this connection it must be borne in mind that in the case of an unincorporated association there is no implied authority conferred by the members upon any organ of the society to do a wrongful act on their behalf (see *London Association for Protection of Trade* v. *Greenlands, Ltd.* [1916] 2 A.C. 15, 39, *per* Lord Parker). On the other hand, if the committee was so authorised, such authority must have been conferred by the whole body of members (*including the plaintiff himself*). For the body of members has given no express authority to the committee to expel a member wrongfully; such authority can be deduced only from the rules of the society, and if such authority can be derived from the rules it is attributable to the plaintiff

himself as well as to the other members (see (1915) 113 L.T. at p. 1062, *per* Bankes L.J.).

It will be seen, therefore, that the only effective way out of this dilemma is to postulate a separate entity, *viz.*, the union itself, distinct from its members, and then to say that the committee has acted on behalf of the union itself and within the scope of its implied authority. Two points arise here, *viz.* : (a) Has the union a distinct personality of this kind? (b) If so, what is the nature of the cause of action for damages against the union?

(a) The status of the modern trade union is derived from various statutes, commencing with the Trade Union Act, 1871. It has long been recognised that trade unions are not incorporated even when registered under these Acts; a series of decisions has, however, conceded at least a " quasi-corporate " status to these bodies. This is obviously an anomalous position, and the precise scope or extent of this status has never been adequately defined. It derives necessarily from the construction of the relevant statutes, which have been held to confer certain attributes of incorporation upon trade unions notwithstanding the absence of a formal act of incorporation. Thus, in the *Taff Vale* case, *supra*, it was held that a union could be sued in tort (in its registered name) and its funds rendered liable to pay damages; and in *Osborne* v. *A.S.R.S.* [1910] A.C. 87, the doctrine of *ultra vires* was applied to a registered trade union. Further, in *Gillian's* case, *supra*, the Court of Appeal upheld the right of a trade union to sue a third person for libel in its registered name and held, further, that the union had a distinct " character " which was capable of being defamed. This latter decision appeared to proceed specifically upon the basis that the legislature had created a new entity in law, which though not a corporation was very much like one. Scott L.J., indeed, went so far as to express the opinion that a trade union was given all the powers of a *persona juridica* except those solely characteristic of a natural person [1] and those expressly excepted by the creating statute.

The majority of the Court of Appeal declined to accept these decisions as decisive of the status of a trade union for all purposes. They distinguished the *Taff Vale* case and *Gillian's* case on the basis that those cases were dealing with the rights of third parties to sue the union for tort or vice versa, and not with the relations between an individual member and the union itself. This may seem a rather unreal distinction, and, indeed, the Master of the Rolls at this point evinced a tendency to fall back upon the argument that if Parliament in its wisdom chooses to create a body which, while having some of the attributes of a corporation, does not possess true corporate status, then anomalies and difficulties appear to be inevitable. As against this, it may be said that the main objection to the formal incorporation of trade unions was that it was not

[1] A corporation strictly so-called would not possess these either.

considered desirable, when the early Trade Union Acts were passed, to allow trade unions to sue and be sued by their members.[2] This principle was in effect enshrined in section 4 of the Act of 1871, which prevents the direct enforcement of certain agreements. It might therefore be argued that the union can be sued as such by a member save in the case of those agreements specified in section 4. This appears in effect to result from the view of Scott L.J. referred to above. If, on the other hand, this view is right, it is difficult to see in what respect it remains possible to say that a trade union is not a true corporation in law. In other words, the wheel will have turned full circle, and by a process of judicial construction a body which admittedly was conceived or not intended to be incorporated will now have finally been held to have had "impliedly" conferred upon it every essential attribute of a true corporation, and to be indistinguishable from such a body. This is by no means an impossible exercise in judicial construction, though it would be a remarkable one. Indeed, it may be argued that the courts have already carried the process so far that it remains inconsistent and unrealistic not to carry the matter to its ultimate conclusion.

Denning L.J., in his powerful dissenting judgment, traced the steps of this progression to which he desired to add the final step. He pointed out that a trade union has certainly attained an independent personality in fact, but (while citing some well-known words of Dicey) refrained from falling into the assumption of the "realists" that it necessarily followed that a union was also an entity in law. On an examination of the statutory provisions and the decided cases upon them the learned Lord Justice reached the conclusion that, whatever the desire of those who passed the statutes may have been, trade unions were given such rights and duties, powers and capacities, as necessarily resulted in legal personality being conferred. In other words, the courts had done no more than recognise the inherent logic of the statutory provisions themselves and the status of trade unions thereunder. ["When trade unions were first legalised eighty-three years ago, their supporters were very anxious that they should not be made corporations, because they wanted to avoid the liability which flowed from corporate personality. . . . But when the statutes came to be enacted it was found that this was not a possible state of affairs. The trade unions, had, perforce, to be given a legal personality; and you cannot have the benefits of legal personality without the responsibilities attaching to it" (at p. 708).]

[(b) If it is once recognised that a trade union is an independent entity for the purpose of contracting with its members, then presumably the initial contract by which the member enters the union will no longer be regarded as a contract between him and the other

[2] See Hedges & Winterbottom, *Legal History of Trade Unionism*, pp. 66–7.

members but between the member and the union itself.[3] Accordingly, there would then be no difficulty in treating the committee or official as agent of the union and, hence, as capable of rendering the union liable for breach of contract. The Court of Appeal has previously expressed the view that wrongful expulsion is not in itself a tort.[4]

On the merits of the case it is interesting to contrast the conflicting views. The Master of the Rolls thought that to allow a claim for damages would not of necessity be universally regarded as beneficent, and would put the member in an advantageous position not enjoyed by members of other voluntary associations (p. 706). Jenkins L.J. confined his observations to justifying the distinction between a claim for damages as against one for a declaration, and an injunction on the fundamental premise that the action was in respect of a breach of a contract between the plaintiff and the other members. The learned Lord Justice pointed out with great cogency (*pace* Scrutton L.J.) that such a plaintiff might legitimately claim a declaration as to whether the exclusion was wrongful or not, but that this was a very different matter from seeking to hold the other members responsible in damages for the wrongful act of the committee which was *ex hypothesi* unauthorised (p. 721). Jenkins L.J., however, did not seek to justify the decision on the merits on the footing that his fundamental premise might be wrong. On the other hand, Denning L.J. forcefully emphasised the power of the union to exclude the plaintiff from earning his livelihood (as it had effectively done in this case for some four years). "A man's right to work is just as important to him, indeed more important, than his right of property. If he is unlawfully deprived of his right to work, the courts should intervene to protect him" (pp. 706–7). In the light of the enormous growth in the power of trade unions in recent times it is difficult to avoid the feeling that they, too, should have to face up to their responsibilities, and that certainly on the merits of the case there is much to be said in favour of the view of Denning L.J.

It remains to point out that even on the basis of the majority decision, it does not follow that the expelled member is entirely deprived of his claim to damages. For such a claim may be brought against the committee or official (assuming he is a member of the union), personally, for breach of the contract between the committee or official (*qua* members of the union) and the plaintiff.[5] And as Denning L.J. pointed out (at p. 713), the mere fact that the exclusion was a nullity in law would not prevent its operating in

[3] s. 4 of the Trade Union Act, 1871, refers to "agreements made between one trade union and another." But in the case of internal agreements it leaves unspecified who are the contracting parties.

[4] See *Abbott* v. *Sullivan* [1952] 1 K.B. 189.

[5] This was apparently recognised in *Abbott* v. *Sullivan*, *supra*, the real difficulty in that case being to establish the contract between the parties in the absence of any written constitution (*cf.* (1952) 15 M.L.R. 413 *et seq.*).

fact to cause actual injury for which damages might be recovered.[6] But, of course, a judgment against an official might be worth a good deal less than one enforceable against the funds of the union.

Sir Raymond Evershed expressed the "serious hope" that the whole question might be reviewed by the House of Lords. The matter is of great importance to trade unions and their members, as well as being of considerable legal interest, and readers of this *Review* will respectfully echo this hope of the Master of the Rolls that the matter may be finally given that exhaustive scrutiny which can now come only from the highest tribunal.

DENNIS LLOYD.

CONTRIBUTORY NEGLIGENCE AND VICARIOUS LIABILITY

A SHOT-FIRER in a mine acts in a grave breach of his statutory duty by firing the shot without ascertaining that all persons in the vicinity have taken proper shelter. A mineworker is also guilty of breach of statutory duty because he helps the shotsman by coupling up the cable to the detonator (a duty imposed by the regulations upon the shotsman). The mineworker is injured when the shotsman prematurely fires the shot, while he (the mineworker) is still in the act of coupling up the cable. Has the mineworker any remedy against the shotsman or the master?

It may seem surprising that such simple facts should still bristle with elementary legal questions worthy of consideration by the House of Lords. The case was *National Coal Board* v. *England* [1954] 2 W.L.R. 400. Some arguments were easily disposed of. The mere fact that the two men were collaborating in a dangerous and negligent course of conduct did not bring the *volenti* doctrine into play. Nor was the mineworker disentitled from suing under the maxim *ex turpi causa non oritur actio*: "plaintiff a wrongdoer" is not one of the general defences recognised in tort. It may be hoped, without much confidence, that the irrelevance of these two maxims in ordinary cases of contributory negligence will now be taken as settled. Lord Asquith did, indeed, envisage some slight application of *ex turpi causa* to an action in tort. "If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A." Lord Asquith appeared to distinguish this hypothetical illustration by saying that in the instant case the wrongful act was totally unconnected with the common illegal purpose, and was not a step in execution of it. One might also point out that the

[6] Denning L.J. also repeated his view, previously expressed in *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, and *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329, that a rule allowing expulsion must conform with "natural justice" or it will be held invalid (see at pp. 691–2).

illustration of the burglars carries the more conviction simply because they are burglars, and therefore guilty of grave crime far removed from a mere breach of safety regulations.

Another defence was that the mineworker was acting outside the scope of his employment and was therefore solely responsible for his own injury. This muddle-headed argument was rejected, by Lord Porter on the ground that the mineworker was not acting outside the scope of his employment, and by Lord Reid for the more obvious reason that the two questions relate to different fields. The course of employment doctrine, which pertains to the defendant's vicarious liability, has nothing to do with remoteness of damage or legal responsibility for contributory negligence.

The mineworker was, therefore, entitled to damages; but still further questions remained. Should any deduction be made for his contributory negligence? The Court of Appeal had taken the view that the sole operative negligence was that of the shot-firer; but the House of Lords, while concurring that he was the more at fault, was prepared to find the mineworker one-quarter to blame. A difficulty was that the trial judge, who had held that the plaintiff's claim failed, had added that if it had succeeded he would not have given the plaintiff more than half his damages. The House of Lords, by a majority, held that this expression of opinion did not prevent an appellate court from making its own apportionment. Lords Porter and Reid explained this by saying that the wide difference between the trial judge and the appellate court as to the degree of fault warranted an interference with the former's apportionment, and Lord Porter took the additional point that the trial judge had made no exact determination, but merely said that he would not give the plaintiff more than one-half damages if he had found any liability. The latter point is somewhat difficult to follow, for it does not seem to be an argument for giving a plaintiff three-quarters of his damages that the trial judge has stated that he should not have more than one-half. Perhaps what Lord Porter primarily had in mind was that the apportionment by the trial judge was only a provisional or hypothetical one, the claim in fact being dismissed. There is much to be said for the view that an appellate court should not be bound by such a provisional apportionment, for a trial judge who has wrongly dismissed the plaintiff's claim may well give him an unduly small proportion of damages in the provisional apportionment. The same factors that led him to dismiss the claim may have led him into making too unfavourable an apportionment. Moreover, there is not here any danger of encouraging appeals on what is largely a matter of personal opinion, because the main appeal is on the question of substance, and the effective apportionment is made for the first time by the appellate court.

Even this did not exhaust the legal problems in the case, for there remained the question whether the National Coal Board were

liable for the negligence of the shotsman. They were not guilty of personal negligence, because there was no negligent system of working. It was argued that they were not vicariously liable for the shotsman's breach of statutory duty, because this duty was personal to the shotsman. The House of Lords contented itself with deciding that the shotsman was in any event guilty of negligence at common law, that the statutory duty did not displace this negligence, and that the board were vicariously liable in respect of it. It seems unfortunate that although the wider question of law was presented for decision, and argued, the House should have refrained from ruling upon it. Some day the question will have to be settled, and there seems to be no particular advantage in postponing it.

GLANVILLE WILLIAMS.

CATTLE-TRESPASS—LIABILITY FOR PERSONAL INJURY

Wormald v. *Cole* [1954] 2 W.L.R. 613, shows how important questions even in the most ancient parts of the law may still be free from authority. The short effect of the decision is that an occupier who sues in cattle-trespass may recover damages for personal injury received by him, at any rate where this injury was not sustained as a result of a mischievous propensity in the animal; in the latter case it may be that proof of *scienter* or negligence is required. Dicta in various earlier cases seemed superficially to be against the view of the law now taken by the Court of Appeal; but in none of these cases was the point directly in issue.

Although the judgments are well reasoned in a legal sense, it may be questioned whether the result is satisfactory. Lord Goddard C.J. recognised this when he remarked: "It no doubt may be said to be anomalous that a man can maintain an action of trespass to land without proof of *scienter*, though for injury to the person apart from trespass to land he must proceed in negligence and prove *scienter*." (The last "and" should be "or.") Similarly, Singleton L.J. said: "It may seem strange to some that the plaintiff is entitled to recover, whereas if her man had been injured he would, in the absence of negligence, have had no cause of action." English law attaches too exaggerated an importance to the technical infringement of a land-boundary. If the action of cattle-trespass were abolished, nothing of value would be lost to the law, and a good deal of technicality would be saved.

In the course of his judgment, Lord Goddard attempted an analogy. "Suppose a trespasser on a dark or foggy night ran into the occupier in his drive and thereby caused him to fall and injure himself, it seems to me clear that the trespasser would be liable for the injury as part of the damage for the trespass." This seems to mean that everything is at the trespasser's peril during the continuance of the trespass. Yet the modern view is that a trespass is not

actionable if it is the result of an inevitable accident—*i.e.*, if it is the result neither of intention nor of negligence. It seems hard to explain why the defence of inevitable accident should be allowed in respect of events leading up to the trespass, but not in respect of events during the trespass. There was no necessary analogy between the situation suggested by Lord Goddard and the case before the court, because, whereas inevitable accident is a defence to an action for personal trespass, it is not generally a defence in cattle-trespass.

Glanville Williams.

Negligence as the Basis of Liability to Trespassers

In *Davis* v. *St. Mary's Demolition Co., Ltd.* [1954] 1 All E.R. 578, Ormerod J. made some advance in the direction of judicial recognition of the desirability of freeing liability of occupiers of land for "active negligence" from the restrictions and classifications which authority has attached to their liability for "passive negligence." But the path he has chosen is not recommended : it leads towards, but not to, the promised land—it ends in hostile territory and a more direct path is to be preferred.

It is well before dealing with the facts and judgment in the case to state briefly some of the juristic analysis of the law. In my note on *Dunster* v. *Abbott* (*supra*, p. 265) I referred to the connection that the distinction drawn by Denning L.J. between liability for "static condition of premises" and liability for "current operations" had with the distinction between the cases of *Addie* v. *Dumbreck* [1929] A.C. 358, and *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404. Starting with the problem of the distinction between these cases Marsh (in 69 L.Q.R. at pp. 360–3) indicated that English law might go beyond the American *Restatement* rule about activity duties, which, in his words, "indirectly throws doubt on the usefulness of the distinction between invitees, licensees and trespassers, at least as far as active negligence is concerned." Marsh suggests that the traditional classification is relevant to "passive negligence," but that "an occupier (or any other person using his land) owes a duty" to avoid positive harmful acts towards any person "of whose presence he either is or ought to have been aware," whether or no such person is a trespasser being immaterial. Newark (*supra*, p. 109) likewise says "it is now coming to be recognised" after a period of "groping" that there is a distinction between what he calls an "Occupancy Duty" and an "Activity Duty." The activity duty is owed by all persons at all times to all persons likely to be imperilled by the activity; it is owed by non-occupiers as well as occupiers; it is owed to trespassers as well as to non-trespassers. These views, which may be traced back to the treatment of the *Wire Rope* case by Scrutton L.J. in *Mourton* v. *Poulter* [1930] 2 K.B. at p. 190, are to be preferred to

the various textbook views which seek for factual distinctions between *Addie's* case and the *Wire Rope* case, and posit rules of law basing liability of occupiers for acts of omission on recklessness, while non-occupiers are given a higher degree of liability.

The textbook views, however, were adopted by Ormerod J., though with reluctance. The facts of the case before him were these. The defendants were a demolition company who had agreed with the owners and occupiers of land to demolish houses which had been patched up after they had been "blitzed." Adjoining the houses there was an open site where children were accustomed to play. Though this was known to the company's workmen, they constantly drove the children away, and it was not disputed that the children were trespassers. One Friday the defendants stopped work for the week-end, leaving the rear wall of a house in a dangerous condition by reason of the fact that the removal of a few loose bricks would cause it to fall. This was a fact of which the defendants ought to have been aware. On Sunday the plaintiff and some other boys trespassed on the site, and by removing bricks brought about the fall of the wall, which injured the plaintiff.

Ormerod J. awarded the plaintiff damages. He held that the defendants were not occupiers, and that non-occupiers were under a duty "to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." For the purpose of this rule a trespasser could be a neighbour. He relied for his law on the judgment of Morris J. (as he then was) in *Buckland* v. *Guildford Gas Light and Coke Co.* [1949] 1 K.B. 410. He found as a fact that the defendants ought to have foreseen that small boys might interfere with the brickwork, and by not taking precautions they had failed in their duty.

The finding that the defendants were non-occupiers was crucial for Ormerod J. Such a finding in view of the nature of the work of demolition is capable of introducing into this branch of law the arbitrary distinctions connected with "possession in law" and "possession in fact." Be that as it may, Ormerod J. considered that the duty of occupiers to trespassers was merely not to show "a reckless disregard of the presence of trespassing children." Authority for this was to be found in his view in *Addie's* case, the *Wire Rope* case and *Mourton* v. *Poulter*. Apparently the defendants had not been guilty of such recklessness. Thus, he considered that while non-occupiers might be liable for simple negligence to trespassers, occupiers were only liable if guilty of recklessness. The advance made in his judgment consists in his awareness of the arbitrary character of this distinction. He said: "I think any decision which puts a defendant who is not in the occupation of land in a different position from the occupier of land is one which must be considered with very great care and caution." The absurdity of the distinction is seen from the reflection that, according to Ormerod J., the plaintiff would have failed if the demolition

had been carried out not by independent contractors but by servants of the owners and occupiers. It surely cannot be sustained.

The alternative method by which Ormerod J. could have found for the plaintiff would have been to have applied the principle of liability for "current operations" suggested in the preceding week by Denning L.J. in *Dunster* v. *Abbott* (see *supra*, p. 265). It is true that, as formulated by Denning L.J., the liability did not extend to trespassers. But the Lord Justice was not in the case before him concerned with trespassers. Another difficulty is that the accident happened on Sunday, while the activity of the defendants ended on Friday. It is submitted, however, that the notion of "current operations" cannot be limited to strict simultaneity. It might perhaps be better to accept the formulation of the rule for liability for active negligence in a manner similar to the proposals of Marsh and Newark, which omit any reference to the contemporaneity which appears in the dictum of Denning L.J.

It is pertinent to point out that *Buckland* v. *Guildford Gas Light and Coke Co.*, on which Ormerod J. relied, is inconsistent with the decision of the Court of Appeal in Northern Ireland in *McLaughlin* v. *Antrim Electricity Supply Co.* [1941] N.I. 23. Both cases were concerned with children being electrocuted by overhead high-power electric cables. In the former case, a girl climbed a tree situate in a field some ninety feet from a footpath; in the latter case a boy climbed the pylon carrying the wires, which adjoined a lane. Morris J. held that the defendants had failed to prove that the girl was a trespasser in the field, but considered that even if she were, the defendants were liable since they were not occupiers. (They were, of course, not in occupation of the field, but they were occupiers of the space filled by their wires.) The majority of the Court of Appeal considered that the boy was a trespasser (Babington L.J. held that the boy was in the lane as of right and so was not a trespasser on the pylon), and in the words of Murphy L.J., "the plaintiff as a trespasser was bound to take the pylon as it was, and trespassed at his own risk." Both cases were concerned with "static conditions," and the *Wire Rope* case was not in point. It was, however, relied on by counsel in the Northern Ireland case, where Andrews L.C.J. found that the distinction between it and *Addie's* case was that the plaintiffs in the *Wire Rope* case were licensees! The *Wire Rope* case was not cited in *Buckland* v. *Guildford Gas Light and Coke Co., Ltd.*, but neither was *McLaughlin* v. *Antrim Electricity Supply Co.*, which was directly in point.

J. L. Montrose.

Evidence—Corroboration of Accomplices

The principal ground of the appeal to the House of Lords in *Davies* v. *Director of Public Prosecutions* [1954] 2 W.L.R. 343,

was that Hilbery J., the trial judge, did not warn the jury that the evidence of one Lawson, a Crown witness, was the evidence of an accomplice. This appeal, which was dismissed, gave the House an opportunity of considering two important questions which were posed by Lord Simonds L.C. (in whose opinion the other members of the House concurred) as follows: "(A) What is the scope and effect of the rule that a judge ought to warn juries in connection with the evidence of an 'accomplice'?" and "(B) What is an 'accomplice' within the rule?"

There is no doubt that the uncorroborated evidence of an accomplice is admissible at law, but it has long been the practice of the courts to treat such evidence as unreliable, and for the judge to warn the jury that, although they may convict on such uncorroborated testimony alone, it is dangerous to do so. This practice was accepted as long ago as 1788 in *R.* v. *Atwood*, 1 Leach C.C. 464. But over the years a change in emphasis has taken place, so that that which was once merely a rule of practice has taken on the appearance of a rule of law: for example, Lord Reading C.J. in *R.* v. *Baskerville* [1916] 2 K.B. 658, 662, delivering a judgment of a strong court (Lord Reading C.J., Scrutton, Avory, Rowlatt and Atkin JJ.), could say: "This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed." This opinion, though entitled to great weight, was nevertheless *obiter*, and there were other appeals (*e.g.*, *R.* v. *Tate* [1908] 2 K.B. 680, *R.* v. *Moore* (1942) 28 Cr.App.R. 111) to the same court both before and after *Baskerville* which emphasised the discretionary nature of the rule. Thus, Lord Simonds L.C. in the *Davies* case, could say there were two schools of thought, namely, the "discretionary," which considered the rule one of practice, and the "peremptory," which held that the rule was one of law. After consideration of the authorities Lord Simonds L.C. was of the opinion that the weight of authority was in favour of the latter school, subject to the operation of the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The Lord Chancellor then laid down three propositions which he considered accurately to represent the law as follows: (i) "In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated"; (ii) "This rule, although a rule of practice, now has the force of a rule of law"; (iii) "Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907."

Lord Simonds L.C. then turned to the second question: "What

is an accomplice? "; and considering the antiquity of the rule it may come as some surprise that he could observe : " There is in the authorities no formal definition of the term." On this question there are two possible approaches; one can either define the word " accomplice " precisely or one can avoid such a definition and merely enumerate certain categories of persons who fall within the term. The advantage of the latter approach is that it leaves the court free to add to the existing categories should the need arise. Thus, although the primary meaning of " accomplice " must be a person who is a party to the crime with which the prisoner is charged, the courts (see *R.* v. *Jennings* (1912) 7 Cr.App.R. 242, and *R.* v. *Dixon* (1925) 19 Cr.App.R. 36) have considered themselves free to extend the term to receivers and to treat them as accomplices of the thieves from whom they have received stolen property. More recently, in *R.* v. *Farid* (1945) 30 Cr.App.R. 168, the term has been extended to include witnesses called by the Crown to testify to other similar offences, to which the witness and the prisoner were parties, in order to show system, or to negative mistake or accident under what is known as the " similar fact doctrine." The Court of Criminal Appeal in dismissing Davies's appeal was reluctant to tie the the hands of the courts in the future by giving an exhaustive definition of the word " accomplice." Sellers J., who delivered the judgment of the court, said : " It may be that for the purposes of the rule which is concerned with the testimony of witnesses whose evidence may be influenced in the witness's own interest that the court should not seek to lay down a narrow or precise definition of an " accomplice." It may be that certain witnesses should, in the interest of a fair trial, be treated as accomplices " ([1954] 1 W.L.R. 213 at p. 218).

However, Lord Simonds L.C. did not take the latter course, and set out narrowly and precisely to define the term " accomplice." In his opinion, the natural and primary meaning of the term is to cover witnesses called for the prosecution who are " *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies), or persons committing, procuring or aiding and abetting (in the case of misdemeanours)." To this primary category, the Lord Chancellor admitted two exceptions or two further categories, namely, the two classes already referred to of receivers and witnesses whose evidence is admitted under the " similar fact doctrine."

From the last two categories, the Lord Chancellor was not prepared to evolve some general definition of the term " accomplice," or a further category, so as to cover, for example, witnesses who are guilty of an offence so intimately connected with that committed by the prisoner that the one could not have been committed without the other. Thus, to be an accomplice in the present case, Lawson, the witness whose evidence was in question, had to come within the first category enumerated by Lord Simonds, *i.e.*,

he had to be an accomplice to the crime of murder with which Davies was charged, and this the Lord Chancellor was not prepared to hold he was. The appeal was therefore dismissed principally on the ground that Lawson was not an accomplice.

Having defined "accomplice" the question remained as to who is to decide whether a particular witness falls within the term. On this point Lord Simonds L.C. suggested that, apart from the clear cases where the question is answered by the witness himself, by confessing to participation, by pleading guilty to it, or by being convicted of it, the cases fall into two classes. "In the first, the judge can properly rule that there is no evidence that the witness was . . . a 'participant' . . . "; but in the second class fall ". . . cases . . . in which there is evidence on which a reasonable jury could find that a witness was a 'participant.' In such a case the issue of 'accomplice vel non' is for the jury's decision. . . ." A formal acquittal of the witness, against whom no evidence has been offered, on the same charge as the prisoner was considered by the Court of Criminal Appeal to be sufficient to determine whether he was an accomplice or not ([1954] 1 W.L.R. 213, 217). Counsel for the Crown and for the appellant in argument before the House of Lords were of the opinion that the attitude of the Court of Criminal Appeal on this question could not be supported. The Lord Chancellor would appear to have left the question open. No doubt the verdict removes from the witness any motive he may have to shift suspicion from himself by fixing it on another, but in the circumstances his evidence may remain just as unreliable, and it is suggested that the formal acquittal ought not to be conclusive.

J. D. Newton.

The decision in the *Davies* case seems to give an anomalous result which might have been avoided had the Court of Criminal Appeal had power to order a new trial. Lawson was a member of the same gang as Davies, and had been convicted of common assault for his part in the affair, but acquitted of participation in murder, because there was no evidence that he knew that Davies carried a knife. If Davies had been charged with assault, Lawson would have been an accomplice and a warning would have been necessary. Actually, Davies was charged with murder; but this murder was one that contained an assault to which Lawson was a party. It is surprising that, in these circumstances, the corroboration rule should not apply. The reason underlying the corroboration rule is the danger of false evidence from one who is himself implicated in the crime. This danger is present, though perhaps to a smaller extent, even where the accomplice is party only to a lesser deg of crime. In the instant case, the evidence of Lawson was, to say the least of it, tainted. He was in a much better position to falsify and colour

his evidence against the accused, if he had been so minded, than an accessory after the fact is in respect of the principal felon, or than a receiver of stolen goods in respect of the thief, for neither of these persons is generally present at the time of the crime, whereas Lawson was present and knew most of what was going on. Lord Simonds recognised that the accessory after and the receiver come within the corroboration rule; yet he could " see no reason " why the rule should include Lawson. Perhaps there was no reason if one thought only in terms of a technical rule and a technical definition of terms; but it is regrettable if the supreme tribunal should so restrict its horizon.

Glanville Williams.

Evidence—Proof of Adultery

Galler v. *Galler* [1954] 2 W.L.R. 395; [1954] 2 All E.R. 536, decides no more than that an adulterer who gives evidence of his own adultery is in the same position as an accomplice in a criminal case, so that the court must direct itself that it should be slow to act on such evidence in the absence of corroboration. But the Court of Appeal took the opportunity to make yet another pronouncement upon " the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action, is the same as that in a criminal case, and whether the same rules apply." It is upon the analogy of the criminal law that the earlier pronouncements of the Court of Appeal have invariably based the requirement of a standard of proof higher than is usual in civil actions, and this analogy was accepted by Lord Oaksey in *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391, 409. But the analogy is false (see 65 L.Q.R. 220; 14 M.L.R. 411), and it was expressly rejected by Lord MacDermott in *Preston-Jones* (at p. 417), and later questioned by Evershed M.R. in *Allen* v. *Allen* [1951] 1 All E.R. 724, 731. Lord MacDermott stated that the true reason for the requirement of the higher standard " lies not in any analogy, but in the gravity and public importance of the issues," in that (i) " the jurisdiction in divorce involves the status of the parties," and (ii) " the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry." As, however, Lord MacDermott appears to have assumed that there is not one standard where a child's status is in issue and another where adultery *simpliciter* is to be established, it may be said that the two competing reasons for the requirement of the higher standard of proof are the analogy of the criminal law and the sanctity of marriage.

In *Galler* v. *Galler* (*supra*), Hodson L.J. (with whom Jenkins and Singleton L.JJ. agreed), having cited the authority for both reasons, concluded that " the result is the same by whichever road

one travels : in divorce, as in crime, the court has to be satisfied beyond reasonable doubt." It may be remarked, first, that, *pace Davis* v. *Davis* [1950] P. 125, and *Bater* v. *Bater* [1951] P. 35, this statement equates the standard of proof in the divorce court with that in the criminal courts, though paradoxically it adopts the formula " proof beyond reasonable doubt " at a time when the Court of Criminal Appeal has recently condemned this formula (*R.* v. *Summers* [1952] 1 T.L.R. 1164). Secondly, it appears to apply that formula generally to all proof in the divorce court. Thirdly, the words " the result is the same by whichever road one travels," appear to treat as irrelevant the ground on which the higher standard is required. But if the rule is grounded on the analogy of the criminal law, it should apply only to criminal and quasi-criminal matrimonial offences, though it should so apply in all proceedings in which they are in issue. If, on the other hand, the rule is based upon the sanctity of marriage, it should apply only to evidence tending to " set aside " the marriage : it should not apply to evidence tending to uphold the marriage, and it should not apply to evidence of matrimonial offences in other than divorce or similar proceedings. If, again, the rule is founded on the fact that divorce involves the status of the parties, it should apply to all questions of status, whether raised in the divorce court or elsewhere. It may finally be remarked that Hodson L.J. adopted Lord MacDermott's conclusion that the word " satisfied " is incapable of connoting anything less than " satisfied beyond reasonable doubt " —a conclusion which, it is submitted with respect, is contrary to the dictates of logic, philology, common usage, legal practice and authority (see 14 M.L.R. 415), and which can, therefore, be justified only in terms of " policy."

J. A. Coutts.

Discipline and Fireman Fry

Recent decisions of English courts and the Judicial Committee of the Privy Council have all but destroyed the ancient presumption that public authorities, in exercising discretionary powers in relation to persons and property, must observe the *audi alteram partem* rule of natural justice. Today, the courts may hold that a duty to comply with natural justice is to be superimposed upon procedural requirements that are already expressly prescribed; but where no such requirements are expressed they consistently refuse to read into the grant of a power any implied duty to afford notice and a fair opportunity to be heard to those who are directly affected by its exercise. Their judgments have been characterised by a reluctance to classify discretionary powers as judicial, by a somewhat unpredictable tendency to restrict the scope of certiorari, and by the drawing of unconvincing distinctions between the deprivation of a right and the withdrawal of a mere privilege. This is not the

place to consider the issues of public policy raised by these developments; though it may be observed that two unanimous decisions of the highest courts in Canada and South Africa have recently re-emphasised the value of the presumption formerly applied in this country.[1] The present note is concerned mainly with the implications of a new principle which threatens to weaken still further the efficacy of the *audi alteram partem* rule, and of judicial review generally, in English administrative law.

The principle was first stated by Lord Goddard C.J. in *R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150 at 1155:

> "Where a person, whether he is a military officer, a police officer or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that would interfere with the free and proper exercise of the powers that it may be expected he would otherwise use."

In *Parker's* case[2] this was one of several reasons given for holding that the Commissioner of Police, in deciding to revoke a London cab-driver's licence, was not acting in a judicial capacity, was under no duty to cause an inquiry to be held in conformity with the rules of natural justice, and was not subject to control by certiorari. In the recent case of *Ex p. Fry* [1954] 1 W.L.R. 730, Lord Goddard reiterated this proposition and used it as the sole foundation of his refusal of an *ex parte* application for leave to move for certiorari to quash an order. Since the Court of Appeal in this case, while not adopting his reasoning, did not in terms disapprove of it, and since the Divisional Court is bound by its own decisions, the proposition deserves examination.

Fireman Fry had refused to obey an order to clean an officer's uniform, on the ground that a service instruction had prohibited the employment of firemen on such duties except by private arrangement. He was thereupon suspended from duty on half-pay[3] and charged with a disciplinary offence. The charge was heard before the chief officer of the local fire brigade under the Fire Service (Discipline) Regulations, 1948. These regulations lay down a detailed code of procedural rules. If any punishment other than a caution is imposed, the accused may appeal to higher authority. Here the chief officer found the charge proved and administered a caution. In the result, Fireman Fry was unable to recover his full

[1] *Alliance des Professeurs Catholiques de Montréal* v. *Labour Relations Board of Quebec* [1953] 2 S.C.R. 140; *R.* v. *Ngwerela* 1954 (1) S.A. 123. See also *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co.* [1953] N.Z.L.R. 366.

[2] Criticised by D. M. Gordon, "The Cab Driver's Licence Case" (1954) 70 L.Q.R. 203: Anon., 117 J.P.J. 541, 589.

[3] In virtue of the Fire Services (Ranks and Conditions of Service) Regulations, 1948, reg. 11, Sched. 6.

pay for the period during which he had been under suspension, and he had no right of appeal.

He applied for leave to move for certiorari on the ground that he had been denied a fair hearing because he had not been supplied with certain particulars which, he claimed (erroneously, so the Court of Appeal held), were required by the regulations, and because the chief officer had brushed aside without consideration a submission that the proceedings were out of order, and had refused to allow an argument to be developed that the order to clean the uniform was unlawful. The Divisional Court, consisting of Lord Goddard C.J. and Hallett J., refused the application. The Lord Chief Justice found it

> "impossible to say that a chief officer of a force which is governed by discipline, such as a fire brigade is, in exercising disciplinary authority over a member of a force, acting either judicially or quasi-judicially, any more than a schoolmaster is when he is exercising disciplinary powers over his pupils."

He had never heard it suggested that certiorari would issue to review the orders of a commanding officer exercising summary powers under the Army Act, or of police disciplinary authorities. It went to courts, or to something which could fairly be said to be a court. The concept of a "court" had been expanded to enable orders made by government departments to be reviewed, but interference with the administration of disciplinary services was a different matter.

The judgment provokes several comments. First, a court can find, among the multitudinous cases on certiorari, authority for classifying as judicial almost any order directly affecting individual rights, if it is so minded. Secondly, in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, the Court of Appeal held a disciplinary function to be judicial; there the remedy sought was a declaratory judgment, but this was irrelevant to the classification of the power. Thirdly, although there may be no authority to the effect that certiorari will go to military disciplinary bodies other than courts-martial, or to police tribunals, the present writer is unaware of any decision that it will not; and the conduct of such bodies has been reviewed in other forms of proceedings without any evident injury to the public interest. In *Heddon* v. *Evans* (1919) 35 T.L.R. 642, an action for false imprisonment, the exercise of summary powers by a commanding officer was carefully examined. In *Cooper* v. *Wilson* [1937] 2 K.B. 309, an action for a declaration, the conduct by a watch committee of an appeal against a disciplinary decision made by a police officer was successfully impugned. Fourthly, in so far as the judgment flatly rejects the possibility of issuing certiorari in this type of dispute, it may have unfortunate consequences. If no appeal is provided against the imposition of a severe disciplinary penalty, the courts must still, apparently, refuse to intervene even though carefully prescribed procedural safeguards

have been violated. It is hard to see why the maintenance of discipline in the public services should demand this measure of judicial forbearance. Fifthly, to draw analogies with the grievances of schoolchildren is unrealistic, for abuse or excess of authority by persons who have control over large numbers of employees in important public services may have serious results. The complaints of the applicant may appear trivial, but it may be doubted whether for that reason alone they ought to be deemed unworthy of consideration by a superior court. The courts have hitherto been slow to apply the *de minimis* principle where public authorities have disregarded limitations upon their power: see, *e.g.*, *Patchett* v. *Leatham* (1948) 65 T.L.R. 69. And it must be pointed out that in the present case the chief officer, by administering the lightest possible punishment, had effectively barred the accused from recourse to the formal machinery of appeal.

The Court of Appeal, in affirming the decision of the Divisional Court, followed a different approach. It decided the case on the ground that certiorari was a discretionary remedy and that the applicant, because of his unreasonable conduct in disobeying the order instead of complying with it and then lodging a complaint to higher authority, ought not to be granted the relief he sought. This more flexible attitude towards judicial review of disciplinary proceedings has much to commend it—though opinions may differ upon the exercise of the court's discretion in the case in hand—and it is only to be regretted that the court did not take the opportunity to disavow the legal propositions enunciated by the Divisional Court. The assumption that the court has a discretion in the award of certiorari is interesting, for it is often said that certiorari issues as of right on the application of a party aggrieved and is discretionary only where the applicant has no personal interest in the proceedings: see, *e.g.*, *R.* v. *Brighton Borough Justices, ex p. Jarvis* [1954] 1 W.L.R. 203 at 207, *per* Lord Goddard C.J. The latter view may be founded upon a misinterpretation of the somewhat equivocal judgment of the Court of Appeal in *R.* v. *Surrey Justices* (1870) L.R. 5 Q.B. 466. It is contrary to the weight of authority (see Halsbury's *Laws of England*, 2nd ed., Vol. 9, p. 897, note (*q*)), and the true position seems to be that certiorari issues as of right only when applied for on behalf of the Crown, and that in all other cases the court has a discretion which it will exercise in favour of a party aggrieved unless there are special reasons why he should not have the benefit of it: *R.* v. *Stafford Justices, ex p. Stafford Corporation* [1940] 2 K.B. 33 at 43–5, *per* Sir Wilfrid Greene M.R.

Finally, a word should be added upon the concurring judgment of Hallett J. in the Divisional Court. His Lordship added a further reason for refusing the application: that the attack upon the conduct of the hearing was an indirect attempt to obtain review of the validity of the original order and the consequential suspension

and deprivation of pay. With all respect, one has difficulty in grasping this point. A party who comes to the Divisional Court to allege that he has been prejudiced by a decision of licensing justices or an administrative tribunal that has been arrived at in disregard of natural justice, will seldom be moved by a zeal for rectifying procedural irregularities or raising the standards of administrative adjudication. His purpose will be to have the decision quashed because he does not like it. The court applies the law without speculating upon the ulterior motives of the parties.

S. A. de Smith.

Fitness for Burning

A orders a ton of Coalite from the coal merchant, X, who duly supplies it. A makes up the fire in her sitting-room with some of the Coalite. An explosion occurs because of the presence of a detonator embedded in a piece of coal delivered with the Coalite, and the sitting-room is wrecked. What rights has A against X?

Had this been set as an examination question it would probably have been considered a gift by even the dullest student; A can recover for breach of the implied conditions of quality under section 14 of the Sale of Goods Act. Yet the Inner House of the Court of Session had held otherwise,[1] and the county court judge in *Wilson* v. *Rickett Cockerell & Co., Ltd.*, had followed this decision. Only after three days' argument in the Court of Appeal was his decision reversed: [1954] 2 W.L.R. 629.

The argument of the coal merchant was more ingenious than meritorious.[2] Section 14, it was said, only imports a condition of quality as regards the contract goods. Here the contract goods were a ton of Coalite. There was nothing the matter with the Coalite. The only thing that was unfit was the explosive substance which was delivered with it "by way, I suppose, of a bonus or gift."[3] Hence section 14 did not apply and there was no remedy unless negligence on the part of the coal merchant could be proved. It was this argument which had prevailed in the Scottish case.

Happily, the English Court of Appeal would have none of it. As Denning L.J. trenchantly observed: "A sack of coal, which contains hidden in it a detonator, is not fit for burning, and no sophistry should lead us to believe that it is fit." The opening words of section 14 refer to the "goods supplied under a contract of sale," and that, in his view, applies to all goods so delivered, whether they conform to the contract or not. Evershed M.R. put

[1] *Duke* v. *Jackson*, 1921 S.C. 362.

[2] It is understood that in the county court the case was mainly fought on the facts, the defendants seeking to prove that the explosion had nothing to do with the fuel but that it was caused by negligent repair to the boiler behind the fire-place. However, the judge acquitted both plumber and boiler of any responsibility.

[3] *Per* Evershed M.R. at p. 633.

it rather differently: in his view, what was bought was a load of fuel, and the whole load was defective because of the presence among it of an explosive. It was wholly unreal to seek to interpret the contract as one relating to a number of individual lumps. While it might be possible to distinguish *Frost* v. *Aylesbury Dairy Co.*[4] (the typhoid-infected milk) on the ground that there all the milk was contaminated, whereas here the fuel itself was fit,[5] it was virtually impossible to distinguish *Chaproniere* v. *Mason* [6] (the stone in the bath bun).

Hence, the plaintiff was entitled to recover under section 14 (2) for breach of the implied condition of merchantable quality. Section 14 (1), relating to the implied condition of fitness for a particular purpose, did not apply, since the fuel had been bought under "its patent or other trade name" ("Coalite"). *Semble*, a claim under section 13 (implied condition that goods shall agree with their description) would also have succeeded, but that section had not been pleaded.

L. C. B. G.

Sale of Goods—Illegality

Vinall v. *Howard* [1954] 1 Q.B. 375 (C.A.), is an interesting illustration of the way in which statutory offences may fill the gaps in the law relating to warranties of fitness. The defendant bought a second-hand car and paid by cheque. When he drove the car home he found that it was unroadworthy and he stopped the cheque. When sued upon it he pleaded that the sale was unlawful under section 8 of the Road Traffic Act, 1934, being in breach of section 3 of the Act of 1930. Streatfeild J. dismissed the action, upholding the plea of illegality: [1953] 1 W.L.R. 987. His decision has now been reversed by the Court of Appeal on the ground that section 3 only relates to construction and equipment of the car and not to use and maintenance which had caused the car to be unroadworthy. But it was not denied that an action could not have been brought had the unroadworthiness been due to defects in construction or equipment. *Quaere* whether in that event the seller would have been able to recover the car either: *Cf. Bigos* v. *Bousted* [1951] 1 All E.R. 92. If not, this may indicate a cheap way of acquiring a car.

Having regard to the increasing number of cases in which it is a statutory offence to sell goods subject to a defect in quality or description (*e.g.*, under the recently extended Merchandise Marks Acts, noted in a previous number of this Review at p. 142),

[4] [1905] 1 K.B. 608 (C.A.).
[5] But Denning L.J. (at p. 631) could "see no distinction in principle between liquids and solids," and a chemist would presumably agree.
[6] (1905) 21 T.L.R. 633 (C.A.), which had not been cited to the Court of Session in *Duke* v. *Jackson*.

a plea of illegality may sometimes protect a buyer who cannot rely on any breach of warranty or condition. And it would be open to the courts to hold that a seller impliedly warrants that the sale does not constitute any breach of the criminal code; in the case of the Merchandise Marks Acts, this is expressly provided for in section 17 of the 1887 Act.

L. C. B. G.

THE MORAL OF MALDONADO'S CASE

THE Court of Appeal in its recent decision in the *Estate of Maldonado* [1954] 2 W.L.R. 64 (C.A.), has held that the Spanish Government was entitled to succeed to the movable assets of a deceased person who died domiciled in Spain, following the distinction drawn by Kekewich J. in *Re Barnett's Trust* [1902] 1 Ch. 847, and adopted in *Re Musurus* [1936] 2 All E.R. 1666. If the Spanish Civil Code would have provided that the Spanish Treasury is not *ultimus heres*, but takes by virtue of a *jus regale*, the claim would have been rejected—as was that of the Austrian Treasury in *Re Barnett's Trust*, and that of the Turkish Government in *Re Musurus*. Similarly, the claim of any Commonwealth Government whose law is similar to English law would have been rejected by the Court of Appeal on the ground that such a Government would not have "succeeded" to the deceased, but would have taken the assets as *bona vacantia*. "L. C. B. G." in his note in this journal at p. 167, says that that would be a misfortune. With the greatest respect to the learned commentator misfortune is not the proper description. It would be more fitting to say that the decision of the Court of Appeal administers a well-deserved punishment to those legal systems whose interpreters did not study with sufficient care and attention the legal literature of the civil law countries during the nineteenth century.

All the pandectist textbooks of the nineteenth century deal at length with the question of the "legal nature" of the right of the fisc or State to take the assets of an intestate leaving no known relatives. The Roman law sources were quite clearly to the effect that the fisc or State would be entitled to take these assets. The question, however, was how to "construe" this right. Was it a *jus regale*? Or was it a form of succession? Or, perhaps, something akin to both, though identical with neither, of these possibilities? The controversy was waged with the usual thoroughness and also with the usual arguments *pro* and *contra*. Those interested who wish to get some idea of this battle find a useful summary in Sintenis' *Civilrecht*, 3rd ed. (1869) pp. 339 *et seq.*, and in Vangerow's *Pandekten*, Vol. 2 (1876), pp. 571 *et seq.*

The older school on the Continent of Europe inclined to the idea that the fisc took by virtue of a *jus regale*. This view influenced the interpreters of earlier codifications, such as the Code Napoléon

(Sect. 768), Civile Code (Sect. 760), whose pre-1914 version was discussed in *Re Barnett's Trust*. Lawyers in the countries whose laws were codified in the latter half of the century had the good luck to be able to continue the controversy for another half-century. This half-century resulted in a smashing defeat for the older school and a triumphant victory for those who had maintained the view that the fisc or State was an " heir "—somewhat abnormal perhaps in some respects, but nevertheless an heir. The more modern Codes—like the German (Sect. 1936) and the Swiss Civil Code (art. 466)—adopted this view. In or about the beginning of the century there were therefore some European Continental countries which, because their codes had been compiled at a later date, considered the State as a successor, while others adhered to the older view under which the State took by virtue of a *jus regale*.

The science of the civil law, however, is by its very nature nothing if not flexible. Tradition or even the letter of the law will far more easily be set aside for the sake of greater elegance or other advantages than is the case in English law. Interpreters in the countries of the Code Napoléon had second thoughts and found that they should and could revise their views. The effect is that the " governing opinion " in these countries has now also swung round to the view that the State was a genuine successor; see in respect of France Cass. Reg. 5 Dec., 1923, D. 1924, I 39 and *Beudant*, Cours, Vol. V (1936) No. 125 *et seq.* and for Belgium, Kluyskens, *de Erfenissen*, 3rd ed. (1944), pp. 105 *et seq.* In Austria such a change of view was more difficult as the wording of the code, even in its revised form, proved to be too formidable an obstacle. But even here the *jus regale* seemed to smell too strongly of the Middle Ages and was replaced by a less offensive, though definitely less colourful " right of ownership under the public law " (see E. Weiss in Klang's *Kommentar zum ABGB*, 2nd ed. (1950), Vol. 3, p. 792). Our Scottish neighbours, of course, are always far-sighted : Scottish lawyers have, it seems, for long held that the fisc took as *ultimus heres* (see Stair, IV, 13, 1; Erskine, Inst. III, 10, 2; M'Laren, *Wills and Succession*, 3rd ed., p. 22). Turkey has now adopted the Swiss Code, Greece (art. 1824) has followed the example set by the German Code, and so have the Scandinavian countries (see Arminjon—Nolde—Wolff, *Traité de Droit Comparé*, Vol. 3 (1950), p. 485). It looks, therefore, as if, in Europe, England and Austria were the only countries which have stoutly refused to join the victorious school. If this prevents States retaining the older view from taking movable assets of heirless persons domiciled there, legal scholars should rejoice : here is a clear example of a punishment justly administered to those who did not keep abreast with legal learning and legal development.

The matter is of far greater practical significance than might appear to the uninitiated. One of the results of this last war is that the number of persons who have died heirless and intestate

goes into the millions. Who would have thought that so grave and important a problem as this would depend on the outcome of what irreverent people might consider to have been an obscure nineteenth-century academic dispute?

There is, however, another aspect to the matter. Private international law provides a remedy which, if it had been applied in *Maldonado's* case, might have prevented the Court of Appeal from distributing rewards and punishments in the manner it has done. It would, it is respectfully submitted, have been possible to "classify" the Continental conception of the *ultimus heres* as merely a modernised version of the *jus regale*. Martin Wolff, in the latest edition of his German *Internationales Privatrecht*, 3rd ed. (1954), p. 53, assumed as a matter of course that this would be the solution which an English court would adopt. Comparative lawyers will be glad that the Court of Appeal has not chosen this course, and that the road to the application in future cases of a delightfully subtle, "logical" and time-honoured distinction has not once and for all been blocked. They will note with pleasure that the logic of the differentiation which so impressed the Court of Appeal has similarly influenced many Continental systems of private international law. They will have to join forces with English lawyers in explaining away the fact that in *Musurus'* case the Turkish Government was held not to be entitled to a grant, while in the older case of *Beggia* (1822) 1 Add. 340; 162 E.R. 119, the Sultan of Morocco obtained a grant. The foreign legal system in both cases was the same, *i.e.*, Ottoman law.[1]

E. J. Cohn.

The M'Naghten Rules

It is, to say the least, imprudent to comment on a case without having read the report. Nevertheless, the proposition which Dr. Morris says was laid down in the Australian case of *Stapleton* v. *The Queen* is so startling that comment cannot be repressed. He says (16 M.L.R. 436) that an exhaustive examination conducted

[1] The above note was written before the publication of Mr. Justice Wynn-Parry's decision in *Re Mitchell, decd., Hatton* v. *Jones* [1954] 2 W.L.R. 1114, in which it was held that in English law, too, succession by the Crown is succession *ab intestato*. If this is correct, the decision in *Maldonado's* case which was referred to in argument before Wynn-Parry J., would apply in a very small number of cases only. *Mitchell's* case shows that interpretation of statutes by the courts in English law can produce results no less startling than it so often produces in the Continental systems. In *Mitchell's* case the words "as *bona vacantia*" in s. 46 (1) (vi) of the Administration of Estates Act, 1925, were declared to be "merely descriptive" and therefore in fact meaningless In the *Estate of Hanley* [1942] P. 33; [1941] 3 All E.R. 301, Goddard L.J., had used the following language: "If . . . the Crown takes the estate by virtue of its right to *bona vacantia*, I do not think that it can be said that it is a person entitled upon an intestacy within the meaning of that rule." The controversy as to the nature of the Crown's succession seems therefore to be as much open to discussion in this country as it was in the Continental laws in the 18th and 19th century.

by the High Court of Australia "establishes convincingly that it was morality and not legality which lay as a concept behind the judge's use of 'wrong' in the M'Naghten Rules." It is submitted that such a conclusion is inconsistent with the express words of the judges who laid down the rules.

It will be recalled that the rules consist in the replies of the judges (with the exception of Maule J.) to questions put to them by the House of Lords. In the discussion of the rules in *R. v. Windle* [1952] 2 Q.B. 826, attention was confined to the answer to question 2. But if the first answer be read the use of the word "wrong" in the second answer becomes clear.

The first question was "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or repressing some supposed grievance or injury or of producing some supposed public benefit?" The answer is specific, without any ambiguity whatsoever, that if a person, labouring under partial delusion, knows at the time of committing the crime that he was acting contrary to the law of the land then the defence of insanity does not apply. The actual language of the judges was: "In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land."

The passage usually quoted in discussion of the M'Naghten Rules is that of the combined answer to the second and third questions. These questions deal with the problem of directing a jury about the defence of insanity, and are thus not immediately concerned with exact statements of legal propositions. They take note of the problem of communicating technical doctrines to laymen. The formulation of the questions by the Lords was as follows: "What are the proper questions to be submitted to a jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example) and insanity is set up as a defence?" "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" The well-known answer contains

the phrase "such a defect of reason, arising from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong." This phrase is followed by an explanation of the formula. The judges first point out that the question of the difference between right and wrong will be best understood by a jury if put to them not abstractly but "with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." They then explain why they prefer a summing-up to use the word "wrong" instead of "contrary to the law of the land." They say "If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confuse the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it." When read together with the answer to the first question there is no ambiguity here. The law is that if the accused knew that what he was doing was contrary to the law of the land then the defence of insanity is not applicable (the first answer). But if the summing-up were to use that language then the jury might consider the defence of insanity applicable in circumstances when it was not. The reason is that though the accused did not in fact know that what he was doing was contrary to the law of the land the defence of insanity is still not applicable if "the accused was conscious that the act was one which he ought not to do." The answer continues, "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." It is true that the judges do not give a precise explanation for the phrase "conscious that the act was one which he ought not to do," but the meaning is clear enough. It is adequate for the present purpose to say that it refers to "morality"—though analysis leads to a distinction between the accused's subjective moral belief of what ought to be done and his cognition of other people's moral belief of what ought to be done. But, though the answer thus uses the word "wrong" in order to refer to morality in some cases, it is clear that it does not exclude a reference to legality. It is only if the accused did not know that the act was illegal that it is necessary to ask whether he knew that it was "immoral." It may be sufficient for the jury to consider whether the accused knew that the act was contrary to the law of the land. For if they determine that he did so know, then they should say that the defence of insanity is not applicable. Only if they determine that the accused did not know that the act was contrary to law, do they have to determine whether he knew that the act was "morally wrong." If he knew that it was "morally wrong," even

if he did not know it was contrary to law, then again, the defence of insanity is inapplicable.

It will be seen that a summing-up which asks the jury to consider solely the question of knowledge of legality involves a modification of the M'Naghten Rules in favour of the prisoner. There are dicta in *Windle* which appear to limit the meaning of " wrong " to the sole question of legality. But they are not part of the *ratio decidendi*. This was that the trial judge may withdraw the defence of insanity from a jury if he is of opinion that there is no evidence on which they could find that the accused did not know that the act he was doing was contrary to the law of the land.

The order of questioning in Dr. Morris's Erewhonian examination is thus contrary to that suggested in the M'Naghten Rules. The accused should be asked first about his knowledge of the law of the land and not about morality. It could proceed in this manner:—

Interrogator: " Did you know that what you did was contrary to the law? "

Honest Accused: " No, I did not think it was contrary to the law." (If yes, he may hang.)

Interrogator: " Well then, did you yourself on the facts as you saw them believe that it was right that you should do it? "

Honest Accused: " Yes, I did think it was right." (Presumably if no, then he may hang.)

Interrogator: " One further question; did you think that most other people, seeing the facts as you saw them, would have agreed with you that it was right? "

Honest Accused: (1) " Yes, most people would have agreed with me that it was a right thing to do." (The defence of insanity is definitely made out.)

(2) " No, they don't understand. They think it's wrong, but they are terribly misguided." (The defence of insanity is inapplicable.)

This examination does not merely reverse the order suggested by Dr. Morris. It also raises the question of the significance of the phrase " conscious that the act was one which he ought not to do." If that be limited to subjective moral belief then an affirmative answer to the second question in the examination establishes the defence of insanity and precludes further questioning.

In conclusion I should add that my disagreement with Dr. Morris is confined solely to the question of the interpretation of the M'Naghten Rules. I particularly agree with his view that it is " our atavistic attachment to capital punishment which has precluded any satisfactory solution of the medico-legal problem of the defence of insanity."

J. L. Montrose.

A Judicial Confession

In this *Review* for January, 1954, the General Editor notices the first number of the *Sydney Law Review*, published under the editorship of Professor Julius Stone at the Law School of the University of Sydney. The second number of this journal has now appeared; it more than maintains the standard of the first in its articles, case notes and reviews. The purpose of this note is to draw particular attention to an article by Lord Wright of Durley entitled "Section 92—a problem piece." It is believed that in this article is the only known example of a member of the Judicial Committee of the Privy Council confessing that a judicial doctrine, which as a member of the Committee he helped to create, is wrong.

Lord Wright deals with the first paragraph of section 92 of the Commonwealth of Australia Constitution Act, which provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The judicial history of this section is one of the most interesting examples of the ultimate fate which a political slogan embedded in a constitution can suffer when exposed to Anglo-Australian doctrines of statutory interpretation. The High Court of Australia has construed the section on more than forty occasions. The Judicial Committee of the Privy Council has considered it thrice. Only in the first case in which the High Court dealt with the problem—*Fox* v. *Robbins*[1]—has the court stated plainly that the section was concerned mainly with "free trade" as distinct from "protection." The opinion of the Privy Council in *James* v. *Commonwealth*[2] ends with a statement of the historical position of the section almost as explicit, but unfortunately this statement was preceded by pages of lip-service to intervening decisions which had depended on other concepts—*e.g.*, "regulation as distinct from prohibition," or "ordered liberty with reasonable regulation." Such concepts are indeterminate in any constitutional setting and have little relation to the history and context of section 92. The half approval given to divergent doctrines in *James* v. *Commonwealth* left open the path leading to the decision of the Judicial Committee in the case of bank nationalisation[3] in which the central anti-protection purpose of section 92 is completely disregarded.

Looking back on this long history, Lord Wright now concludes that from the best of motives he and his colleagues in *James* v. *Commonwealth* did not go sufficiently far in restating section 92 as a provision concerned mainly with fiscal protection, and by inference he condemns the decision in the bank nationalisation case. Apart from its great interest to Australian lawyers, and to lawyers

[1] (1909) 8 C.L.R. 115.
[2] [1936] A.C. 578, at 630.
[3] *Commonwealth* v. *Bank of New South Wales* [1950] A.C. 235.

everywhere concerned with the interpretation of federal constitutions, Lord Wright's article raises the question whether we should not encourage the great judges of our time to end their judicial careers with a careful survey of the main doctrines they have helped to create, and some indication of the value which they themselves place on that work. Such surveys ought to be free from the transient considerations of expediency which are apt, particularly in constitutional and administrative law, to influence forensic habits.

Not the least piquant feature of this article is that it has been published in time to be quoted in the argument in *Hughes and Vale Pty., Ltd.* v. *New South Wales*, which, at the time of writing this note, is pending before the Judicial Committee on appeal from the High Court of Australia.[4] This case, concerning the validity of transport control regulation, which involves discretionary licensing of inter-state hauliers, brings squarely before the Board the main conflicting theories about section 92. An attempt at re-examining section 92 in the light of its drafting history has for several years seemed so hopeless that even counsel whose case would gain from such a course have hesitated to suggest it. There have also been bewildering cross-currents of political interest in the interpretation of the section, which sometimes influence instructions to counsel; both governments and trade associations involved in cases arising under section 92 may want not only to win but to do so for the "right reasons," because of an interest in using those reasons to attack or uphold other legislation. Such interests follow no consistent pattern. "Free enterprise" parties gratified by the effect of section 92 on an Act to nationalise banks may not be so pleased with its potential effect on organised marketing of primary products; "socialist" parties concerned to promote nationalisation in general may be glad of section 92 as an alibi if pushed by zealots into a particular nationalisation scheme that might lose an election. One of the great merits of Lord Wright's article is that, speaking from above such transient battles, he tries to take the courts and the profession back to the intended long-term role of section 92 in Australian federalism. Whether the attempt succeeds or not his Lordship's courage and pertinacity will be remembered.

Geoffrey Sawer.

[4] [1953] A.L.R. 323.

REVIEWS

CARSON: a biography by H. MONTGOMERY HYDE. [London: William Heinemann Ltd. 1953. 515 pp. (with index). 25s. net.]

THE lives of great advocates are a source of perennial interest not only to lawyers, but to the general public. Into the warp and woof of their existences there are woven patterns of drama and personality which make exciting reading, and ensure a constant demand for books about them. Carson was undoubtedly one of the great advocates of his generation and to use a useful American term, as a trial lawyer, which is not quite the same thing, he may have been the best who has ever practised in our courts. Although there is already an admirable life of him by Marjoribanks and Colvin the present life will no doubt have a ready sale. It is competently put together by Mr. Hyde who has the advantages of being an Ulsterman, a member of Parliament, and a lawyer, as well as being a practised author. Moreover the early part of the Marjoribanks-Colvin biography appeared during Carson's lifetime which always makes difficulty for a biographer. Mr. Hyde is, or should be, able to get a better historical perspective, and also has been able to correct a number of mistakes which appeared in the earlier work, notably the extraordinary statement which attracted much attention at the time that the Carsons were descended from an Italian who settled in Dublin in the eighteenth century: it is a puzzle that Carson who appears to have read the manuscript could have passed the statement. Actually it appears that the Carsons came from the Scottish Lowlands. Students of Carson's personality may, however, come to the conclusion that he owed more to the genes which he derived from his mother who was directly descended from General Lambert the Parliamentarian.

Carson's career, especially after he became leader of the Ulster movement, was more political than legal, a fact inevitably reflected in these pages, and which accounts in some degree for the length of the volume. Very nearly half the book is taken up with the political events of the ten or twelve years from 1910 onwards, and since Mr. Hyde does not possess such an attractive style as Mr. Marjoribanks, or even Mr. Colvin, this part of the book tends to drag from time to time. Nevertheless it is of much historical interest, and here and there throws new light, or rather new reflection, upon national history.

The readers of this review will probably be more interested in Carson the trial lawyer than in Carson the political leader. The more important of the *causes célèbres* in which Carson was engaged are carefully and clearly summarised, and the fact that Mr. Hyde is rather too much of a hero worshipper does not prevent his giving a three dimensional portrait of the great man, though Carson's personality was so overpowering that in a sense it builds itself into the pages. In particular the constant duelling with Rufus Isaacs, a man only less capable as a trial lawyer, and if anything a finer advocate, makes exciting reading. Carson had not a fine intellect, but it was shrewd and robust, and within the terms of the intensely personal relationships which provided much of the material for his work, it was highly imaginative. What Mr. Hyde fails to bring out, I think, is the fact that Carson often defeated Isaacs because he had got the measure of his opponent in a way that the latter probably never realised. I remember a junior barrister of some standing telling me of an occasion when he was led by Carson against Isaacs. They were appearing for the plaintiff and it was difficult to get their case satisfactorily onto its feet without calling a certain witness. On the other

hand this witness, if effectively cross-examined, would almost certainly destroy his own side's case—the classical dilemma of the trial lawyer. My friend spent sleepless nights puzzling over the problem of whether the witness should be called, but at the consultation Carson treated the matter very lightly, and when the junior diffidently inquired what they were to do about it he replied that he would decide about calling the witness during the course of the trial. "For," he said, "I have not been against Rufus Isaacs all these years without knowing if he has got the material for breaking up the witness in cross-examination he will not be able to refrain from giving me some indications of it as the case goes on." In the result the witness was called, the cross-examination was ineffective, and the plaintiff won.

Carson's own cross-examination was of course one of the most powerful weapons in his armoury, and Mr. Hyde gives some famous examples of his use of it. I have the feeling, however, that to those who are not familiar with court work the effectiveness of some of this questioning, appearing, as it does, in the somewhat thin context of the summarised facts of the case may not be altogether self-evident. Some rather fuller explanation of what the cross-examiner was aiming to do would have been helpful. Indeed a detailed study of a number of these cases directed principally to that point would be of great value to young advocates, and might well prove fascinating to the general reader.

The handling of a big case requires a sort of generalship, and this Carson had in high degree. Moreover his generalship was of a dynamic quality not common in leaders, whether legal or military. His cases had a habit of developing in a way that he willed, and against the will of his opponent. But he was usually ready, even when the case took a turn for the worse, to try some new tactical line, often successfully. This involved a much fuller grasp and understanding of the facts of the case than most leaders acquire, and could only be attained by intense effort, and a sort of brooding contemplation—he lived with his cases. He found that to attain this mastery required a concentration which he could only provide if he accepted but few briefs, though of course his fees rose in proportion. He was thus after he reached maturity seldom occupied with more than one big brief at a time. In this he was almost if not quite unique among fashionable leaders. Moreover he had none of the ability possessed in such superb degree by Viscount Simon when at the height of his powers of being able to go into court in a complicated case with little more material than could be supplied by a competent devil in a careful note.

In the working out of this pattern of action which was to prove so successful the clerk Herepath played an important part. In this volume he appears as the hero of some amusing stories, but in actual fact Carson owed a great deal to him. He was a shrewd capable man who soon saw that his principal's nervous organisation would crack under the strain of too many briefs. On one occasion, as he told me himself, he returned all the briefs in chambers to the various solicitors who had delivered them, with the demand for a doubled fee. Most of them came back in due course, but in the meanwhile Carson suffered agonies. He was indeed very highly strung, as Mr. Hyde clearly brings out, though only those who knew him well can have realised it. To the outward observer he appeared to be a man of iron, cold, imperturbable, implacable, hardly smiling even when delivering his most telling sallies of wit or humour, for which of course he was famous, and of which some well-known examples are reproduced here. He seems to have been something of a hypochondriac, continually imagining that he was too ill to do his work, but always warming to the task in time to give a first-rate performance.

Carson said throughout that he preferred law to politics, and indeed, he always had a hankering after the bench. Some time before he migrated to England he very nearly took a county court judgeship, and after establishing himself here he hesitated long over whether to accept an offer of the Presidency

of the Probate, Divorce and Admiralty Division. By law, however, I think he meant rather the unravelling of disputed facts by the application of the accepted methods of forensic dialectic than the solution of problems involving difficulties of legal principle. There is no indication in this volume that he had any interest in law as such, and even Mr. Hyde does not contend that his work as a Lord of Appeal had any distinction. Although he sat in the House of Lords for some eight years only four pages in a biography running to nearly five hundred are devoted to his work in that capacity. Indeed, it was only rarely, as when his robust sense of reality prompted him to tear aside the conventional sophistries of such rulings as that in the *Russell* case, that his legal speeches attracted any attention. Indeed his appointment as a Lord of Appeal was just a method of giving him a pension, and though not by any means unique in that respect was a minor scandal all the same.

C.

LEGAL THEORY. By W. FRIEDMANN. Third Edition. [London: Stevens & Sons, Ltd. 1953. xx and 520 pp. (with index). 30s. net.]

THE third edition of a work which can flaunt on its dust cover an earlier critic's opinion that it is "one of the great legal works of the present century" may perhaps be said to be by now beyond the reach of adverse criticism of its general purpose or of its author's execution of that purpose. As, however, this is now something of a standard work, a general comment may not be out of time, in view of the inevitable future editions. In this, the third, edition, it remains true that this is in reality two books: the first 300 pages are devoted to a series of summaries of the legal theories of the past, and the last 200 pages to an examination of certain selected topics viewed in the light of a "relativistic" philosophy. The two parts are in no way necessarily related and should be addressed to two different audiences—the one to the law student, the other to the (shall we say?) connoisseur. Since the author asserts that the book "does not attempt to add a specific legal theory of its own," it may be suggested that from the student's point of view the book would be a better one if it stopped at p. 287. But it would be by no means as interesting. Professor Friedmann might consider publishing pp. 1–287 separately, in an expanded form, under the title *Legal Theories*; the remainder of the work could then be published under some such title as *Essays in Law*, though his *Law and Social Change* might be thought to render this otiose.

For the student, the principal merit of the first edition was its convenient summaries of many philosophies not readily to be found elsewhere. Since the average student had heard of Aristotle, Cicero and some of the medievalists, Professor Friedmann was justified in devoting more space to, for example, his many German writers then comparatively unknown here. But in the intervening decade two things have happened. In the first place, students tend to be as ignorant of the ancient and medieval world as they were (and are) of the more recent German past. And, secondly, a spate of juristic literature relating to legal theory has gushed from the press. Planning a summary of legal theories upon the assumption that the reader will inevitably be more ignorant of some than of others may, therefore, no longer be justified: the time may well have come for a summary in which each theory obtains only that attention that is justified by its historical importance.

In the present edition, however, Professor Friedmann's summary is much as before, though the emphasis has been varied in places and more "overseas" examples given. In Chapter 9, for instance, 3½ pages are devoted to England and 12 pages to America; and, though no doubt this reflects a proper proportion in the influence of natural law on legal development in the two countries respectively, the English student may not be as grateful as he

ought to be. Indeed, American cases interpreting a written constitution are apt occasionally to be not merely no guide but positively misleading in England. The author insists (*pace* Dr. Goodhart) that "reasonableness" is a natural law doctrine, but explains that it is "relative." It is the more unfortunate, therefore, that it is subsumed by him under a general heading "The Search for Absolute Justice"; for by Chapter 9 the reader will not have met the distinction between absolute and relative natural law, and a student who has appreciated (say) Aquinas's concern for absolute, eternal, immutable values will not automatically realise that when the relativist revivalist uses the same terminology he is not speaking of the same thing. The chapter on modern Catholic thought has been rewritten, but, devoted as it is to a series of particular consequential social principles, it still gives no impression of the all-embracing nature of this theory of law and it is still somewhat confusingly separated by some 250 pages from the medieval thought on which it is based. In his rewritten chapter on Socialist legal theory, the author's summary of Soviet theory goes far to establish his claim that "there is no longer any excuse for believing that law in the Soviet state is simply a sham" (provided, that is, that one realises that it operates within the limits assigned to it by Soviet ideology), but the few pages on English Socialism tagged on to the end of Soviet theory appear startlingly out of place.

In the appendant essays (in Parts 6 and 7) there is a large measure of rewriting and the "relativistic" assumptions upon which the selected topics are examined are more positively stated. (Chapter 29 sets out the principal difficulties in the way of *not* accepting such assumptions.) But even the division of these topics into two differently named groups does not mask the fact that they are arbitrarily selected and still form no more than a series of essays. Some of these essays simply proclaim the author's predilections, as in the rewritten last chapter, which is an argued defence of the Welfare State. And, if it be true (Chapter 24) that it was only the comparative stability of the nineteenth century that encouraged a legal professionalism positivist in outlook and inclined to overestimate legal technique, it is equally true that it is the comparative instability of today which causes Professor Friedmann to overestimate the claims of legal relativity, to claim that the courts should decide cases in accordance with social ideals and to believe that they in fact do this. But one suspects that a certain amount of wishful thinking has coloured his estimate of certain trends in the English courts. It is doubtful whether the courts have really changed their practice in the matter of *stare decisis*. It is even more doubtful whether there is a single trend to a more liberal interpretation of statutes. The hand-picked examples on pp. 310 *et seq.* are stultified by what was done and said in the House of Lords in *Magor* v. *Newport* (1951), a decision ignored by the author. One feels from time to time that his conclusions are founded somewhat shakily upon "the great weight of academic opinion" or at most upon a judge or two writing off the record. At times, even dates reveal how easy it is to jump to conclusions: as, on p. 393, where one of the two "recent" decisions which are said to weaken the rule in *Bradford* v. *Pickles* (1895) is *Christie* v. *Davey* (1893).

If future editions are to be aimed at the law student, may we venture to invite the learned author to avoid the following (we believe) defects?—(1) classification for the sake of classification: as on p. 400 where three groups of cases are said to present "essentially different aspects" of the question of piercing the veil of incorporation, though the classification seems justified only for convenience of exposition (in which case it ought to be stated to be so); (2) the multiplication of examples in the form of strings of names (often ending with the words "and others"): as on p. 294, where there are three such lists in one paragraph, or on p. 453 where there is a string of no less than ten names in a row; (3) the repeated use of general terms (particularly adjectives), such as "group organisation in pursuit of political,

economic, cultural or social principles" (p. 348) or "ultimate values assumptions" (p. 507); (4) overstated conclusions likely to startle and mislead the student, if advanced without further explanation: as that the difference between nationality and domicile is of a political, rather than a legal, nature (p. 362) or that consideration is not now taken seriously and is of interest only to the law student (p. 363); (5) (if one may risk the accusation of being pernickety) the frequent idiosyncratic use of a comma in the place of the word "and," thus placing in apposition things which the author means to state disjunctively.

These criticisms are, of course, based upon the assumption that this work is already established as the leading introduction to the subject: they are intended to suggest modifications for a future, and not to deter readers from the present, edition.

J. A. Coutts.

Advocacy: Its Principles and Practice. By R. K. Soonavala, B.A. (Hons.), LL.B., Civil Judge (Bombay Judicial Service). With an Introductory Note on "The Art of Advocacy" by The Hon. Mr. Justice M. C. Chagla, B.A. (Oxon.), Chief Justice, High Court, Bombay. [Bombay: N. M. Tripathi, Ltd., Princess Street 2. 1953. xii and 957 pp.]

Several books have of course been published in Britain dealing with the fascinating subject of Advocacy—amongst them the late Lord Macmillan's *The Ethics of Advocacy,* Lord Justice Singleton's *Conduct at the Bar* (two lectures delivered in 1933), Mr. Justice Hilbery's *Duty and Art in Advocacy* (1946), Judge Parry's *The Seven Lamps of Advocacy,* Edward Cox's *The Advocate: His Training, Practice, Rights and Duties* and Harris's *Hints on Advocacy.*

India, apparently, is not so well off. Says Mr. Soonavala in the Preface to his book: "It is rather surprising that, though in colleges students are instructed in law, they are not taught the art of practising law. Hence the sad spectacle of hundreds of 'advocates' being churned out of our law colleges without any equipment to become successful lawyers and advocates. It is true that there are a few books in our country and abroad on cross-examination, but there are very few books (I believe) in this country which deal with advocacy comprehensively. I hope this book will fill that void."

It is fitting therefore, I think, that I should put on record that during my very limited experience as a High Court Judge at Madras I formed a high opinion of the competence and integrity of the Bar.

None the less, I cannot doubt that law students and advocates in India will benefit from a study of Mr. Soonavala's book. The author describes it as "almost an anthology of ancient and modern thought on the practice and technique of advocacy," and he hopes that it will prove valuable to the beginner in legal practice "for whom it is mainly intended."

Certainly this book represents tremendous industry on the part of the author. It contains no fewer than 116 chapters and five appendices, and, inasmuch as it refers to something like 180 publications, with examples of the Socratic approach to cross-examination and copious extracts from reports of famous trials, it may be said that Mr. Soonavala's description of his own work as "almost an anthology" is fully justified.

I am disposed to think, however, that the book would have been of even more value to the beginner in legal practice if Mr. Soonavala had been content with something much less comprehensive than "almost an anthology." He devotes one chapter specifically to examination-in-chief, but many chapters to cross-examination. It is to be hoped that the beginner in legal practice

will not take this as an indication of the relative importance of these two branches of advocacy. He is certainly told in the course of the chapter dealing with examination-in-chief that "the examination-in-chief of a witness is as important a branch of advocacy as any other," but he would be well advised, I think, to take to heart what Mr. Justice Chagla says on this topic in the excellent introductory note which he contributes on "The Art of Advocacy."

Says Mr. Justice Chagla, "Most people think that an advocate shows his brilliance in cross-examination. That to my mind is a mistake. Sufficient attention is not given to examination-in-chief, and the result very often is that a case is lost by the bad handling of a client by his own advocate in the witness box. An advocate is under a greater handicap in examining-in-chief a witness than cross-examining him. In cross-examination he can almost ask any question and lead the witness. In examination-in-chief he is strictly circumscribed by the rules of evidence, and therefore it is more difficult to get from a witness a consistent and a coherent story."

Mr. Justice Chagla is of the opinion that the first quality an advocate should possess is the quality of presentation, and the second is the quality of fairness. "He must never forget that he is not only fighting the battle of his client but is also assisting in the administration of justice."

For myself, I cannot doubt that the greatest asset an advocate can possess is to be completely trustworthy. It is worth more than all the shining ornaments of advocacy—personality, self-assurance and a silvery tongue.

On one matter at least there is a clear divergence between the views of Mr. Soonavala and the established practice in England. Mr. Soonavala thinks it is "most unethical" for a lawyer to conduct the defence of a client when he considers him to be guilty. "A deep-seated mistrust in the righteousness of your client's case," he says, "may hinder the proper conduct of a suit or trial. The urges of the subconscious will always break through the tight cordons of self-control and discipline. Therefore follow the rule of never accepting a brief unless you believe in your client's case" (p. 11).

In England the general rule is that a barrister is bound to accept any brief in the courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case. Special circumstances may justify his refusal to accept a particular brief. There are of course rules dealing with the position of a barrister who is instructed for the defence in a criminal case where there is a confession of guilt. Different considerations apply to cases in which the confession has been made before the advocate has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings. It is laid down that if the confession has been made before the proceedings have been commenced it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case and no harm can be done to the accused by requesting him to retain another advocate. Other considerations apply in cases in which the confession has been made during the proceedings or in such circumstances that the advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused. But such a confession imposes very strict limitations on the conduct of the defence (see *Conduct and Etiquette at the Bar,* 1953, by W. W. Boulton, Secretary of the General Council of the Bar of England and Wales).

The answer to Mr. Soonavala in advising an advocate never to accept a brief unless he believes in his client's case is to be found, it seems to me, in the famous words of Dr. Johnson: "A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion and then he is bound to give it honestly. The justice or injustice of the case is to be decided by the judge."

Among the more interesting chapters in Mr. Soonavala's book is the last

chapter but one (Chapter 115) on "How to cite authorities." It poses this important question: In arguing questions of law is a person bound to cite cases which are against him? The answer is, I think, undoubtedly, Yes. He is called upon to put before the court any relevant binding decision which is immediately in point, whether it be for or against his contention (see Mr. Justice Hilbery's *Duty and Art in Advocacy*, pp. 15 and 16, referred to in Mr. Soonavala's book at p. 478)

The last chapter contains a hundred hints on advocacy. Even the experienced advocate will surely find some guidance here.

Altogether Mr. Soonavala's book is, on the whole, a very interesting and useful work, and I recommend it to all who desire to avoid the many pitfalls which beset advocates everywhere, young and old alike.

J. P. Eddy.

MacGillivray on Insurance Law. Fourth Edition. By E. J. MacGillivray, ll.b., q.c. and Denis Browne, m.a., Barrister-at-Law, Professor of Law in the University of Sheffield. [London: Sweet & Maxwell, Ltd. 1953. £9 9s.]

The first edition of this standard textbook was published in 1912, and it is pleasant to find the author still actively concerned in the preparation of the fourth edition forty years later. Such an old friend needs no elaborate review, particularly as the previous edition was noted in Volume 12 at p. 532. Some regret may, however, be expressed that it has not been thought fit to couple the resetting of the text with a more careful pruning and revision of it. Thus, one still finds some thirty pages devoted to a history of company legislation and general company law. This, with respect, seems misplaced zeal, particularly as the attempt to summarise the greater part of company legislation in this space is, not unnaturally, hardly successful. It seems doubtful whether anyone will in fact seek guidance on a fine point of company law from this source—and perhaps it is as well, for paragraph 39 is totally wrong—*Donoghue* v. *Doncaster Amalgamated Collieries*, the Court of Appeal authority cited for it, having been reversed in the House of Lords, *sub nom. Nokes* v. *Doncaster Amalgamated Collieries* [1940] A.C. 1014. Valuable space could be saved by restricting the treatment of company law to those rules which are peculiar to insurance companies. In so far as problems of general company law impinge on other parts of the work they could be referred to as they arise; indeed, this already occurs, for example, *ultra vires* is dealt with again in connection with the formation of the insurance contract (incidentally, paragraph 613 fails to pay regard to the changes introduced by section 5 of the latest Companies Act).

Although the book deals with all branches of insurance, except marine, its strength has always lain in its treatment of general principles and of life assurance. Even in these respects the explanation might sometimes be made more helpful. For example, the discussion of Married Women's Property Act policies might make clearer the greatest advantage which these secure namely, freedom from aggregation for estate duty purposes. Admittedly, the knowledgeable can deduce this from what is said in paragraph 1249, but the *knowledgeable* will know it already. It would also have been useful had mention been made of the "gentleman's agreement" between the life offices and the Revenue restricting the number of such policies which any company will issue on the same life. In general, however, the sections of the book dealing with life assurance are most thorough and illuminating, and it is unfortunate that the important and difficult decision of the House of Lords in the *D'Avigdor Goldsmid* case came too late for the learned editors to give us the benefit of their mature reflections on it.

In comparison with these chapters those on other types of insurance seem

somewhat perfunctory. For example, in the discussion of motor insurance, the Motor Insurers' Bureau is referred to in the text, but it is not made clear what its functions are, nor, apparently, is any reference made to the exact nature of the arrangement whereby it fills an important gap in the system of compulsory third-party insurance. Similarly, the discussion of aircraft insurance suggests that compulsory insurance under the Civil Aviation Act, 1949, is in actual operation, whereas, in fact, no regulations bringing it into force have yet been made.

However, the editing of a work of this size and complexity is a herculean task, and one can only express respectful admiration of the care and skill which have obviously been bestowed on it. The publishers have produced a volume as handsome as its price suggests. They have adopted the increasingly popular practice of paragraph numbering, and the pages are unnumbered, thus avoiding risk of confusion by those using the index. This makes it impossible to state the exact length of the work which, however, is certainly bigger than the former edition which ran to over 1,500 pages.

L. C. B. G.

THE LAW OF SUCCESSION. Third Edition. By SIR DAVID HUGHES PARRY, M.A., LL.D., D.C.L., Honorary Bencher of the Inner Temple, Professor of English Law in the University of London. [London: Sweet & Maxwell, Ltd. 1953. xxviii and 348 pp. £1 15s.]

PRESTON AND NEWSOM ON LIMITATION OF ACTIONS. Third Edition. By G. H. NEWSOM and L. ABEL-SMITH, of Lincoln's Inn Fields, Barristers-at-Law. [London: The Solicitors' Law Stationery Society, Ltd. lii and 371 pp. £3 15s.]

ROAD HAULAGE LICENSING. By T. D. CORPE, O.B.E., Solicitor of the Supreme Court. [London: Sweet and Maxwell, Ltd. 1953. xvi and 315 pp. £1 15s.]

THE authors, editors and publishers are certainly to be congratulated for the general excellence and timely appearance of the above three works.

Regarding *The Law of Succession*, there is no need for the reviewer to elaborate upon the usefulness of this book to both students and practitioners alike. With the incorporation of the important changes introduced by the Intestates' Estates Act, 1952, the third edition is a comprehensive modern analysis of the detailed legal principles relating to testate and intestate succession. The relevant statutory provisions and judicial decisions concerning the powers and duties of personal representatives in regard to death duties, administration of assets, and the beneficial distribution of the estates of deceased persons are all lucidly explained in a learned and authoritative manner. Everyone appointed as executor or having to act as an administrator can be strongly recommended to avail himself of the valuable knowledge contained in this work.

The third edition of *Preston and Newsom on Limitation of Actions* incorporates the reported decisions on the Limitation Act, 1939, up to March, 1953, and gives full details of the various statutory provisions affecting the limitation of actions as contained in the Limitation (Enemies and War Prisoners) Act, 1945; the different nationalisation Acts passed between 1945 and 1950; the New Towns Act, 1946; the Crown Proceedings Act, 1947; the Income Tax Act, 1952, and the Intestates' Estates Act, 1952. The "indefensible anomalies" in regard to the special limitation periods relating to public authorities, nationalised industries and statutory corporations are strongly deprecated, and a manifestly justifiable plea is made for an amendment of the law in the light

of the proposals presented to Parliament (Cmd. 7740 of 1949) by the Tucker Committee on the Limitation of Actions. In this connection it is pleasing to note that effect has now been given to the more important recommendations of that Committee by the Law Reform (Limitation of Actions, etc.) Act, 1954.

Road Haulage Licensing is an admirable attempt to formulate the basic principles underlying the licensing of goods vehicles in accordance with the relevant provisions of the Road and Rail Traffic Act, 1933, as amended by the Transport Acts of 1947 and 1953. The subject-matter of this book is of an extremely complicated nature and reflects some of the legal consequences and difficulties resulting from the political nationalisation and denationalisation of the road haulage industry. Although no one would class this book as of enthralling interest to all lawyers, it is nevertheless a sound and safe guide to a subject of considerable practical importance, and as such merits the careful scrutiny of anyone concerned with the many problems relating to the licensing and operation of road haulage vehicles.

M. R. R. D.

An Introduction to Criminal Law. Third Edition. By Rupert Cross, M.A., B.C.L. and P. Asterley Jones, LL.B. [London : Butterworth & Co. (Publishers), Ltd. 1953. lvii and 377 and (index) 30 pp. 27s. 6d.]

Cases on Criminal Law. Second Edition. By the same authors and publishers. [1953. xxxi and 372 pp. (including index). 25s.]

The fact that the third edition of *Cross and Jones*, like its predecessors, adopts the method of exposition by means of numbered articles and comments should not be allowed to obscure its substantial merits as a student's textbook and as a serious contribution to the study of the criminal law. With the appearance of this edition, it is not going too far to say that the work has now come of age, and henceforth deserves to command the attention of those who have previously spurned it. There has been a substantial rewriting of certain parts of the book, while the task of bringing it up to date has been most conscientiously discharged. The result is that it now presents a serious challenge to Kenny as a textbook in this subject.

The greatest changes are in the sections dealing with larceny and kindred offences, where the discussion has been virtually transformed by the addition of an introductory section outlining some of the main problems, the insertion of a new section on the definition of an "owner" for the purposes of larceny, and by the rewriting of the section on larceny by trick. The views expressed are those for which Mr. Cross is already well known through his contributions to the periodical literature, and there is much food for thought in these parts of the chapter on "Offences against Property and Possession."

Considerable improvements have been noticed in the articles on Attempts, Blackmail, Forgery, and Fraudulent Conversion. There are new articles on Obtaining Credit by Fraud and Restitution, and the chapter on Miscellaneous Offences has been improved by eliminating the less important statutory offences (pp. 276–90 of the old edition, with the exception of the Road Traffic Act offences, which are given greater prominence in this edition). The article on Similar Facts incorporates the cases of *Sims*, *Noor Mohamed*, *Harris* and *Straffen*, and the case of *Teper* is quoted in connection with the hearsay rule. The part of the book dealing with procedure appears to have been admirably revised to take account of such Acts as the Magistrates' Courts Act, 1952, and the Costs in Criminal Cases Act, 1952.

A praiseworthy feature of the book is the frequent references to the way in which the law works in practice, for example, the references to the important

part played by judicial discretion and administrative action in regard to the treatment of offenders; the practice with regard to the withdrawal of prosecutions; the limited scope of the offence of public mischief (*R.* v. *Newland* was decided too late for inclusion). The authors' belief that one should describe the law as it actually is rather than as one thinks it ought to be leads them to some interesting conclusions. Thus they define the expression *actus reus* as meaning "a state of affairs prohibited by the criminal law, caused or constituted by the conduct of the accused" (p. 32). This is an improvement upon Mr. Turner's definition in the new Kenny (p. 13) although it derives from that learned writer's analysis of the notion of an act in the *Modern Approach to Criminal Law* (p. 239). It comes remarkably close to the position adopted by Professor Glanville Williams in his recent treatise on Criminal Law (pp. 16 *et seq.*). The same approach enables the authors to recognise that an objective element is involved in the notion of recklessness sufficient to found liability in manslaughter, and in this respect the very cogent conclusions of Professor Glanville Williams are to some degree anticipated.

Disappointing features of the present edition are the absence of any discussion of *R.* v. *Bourne* (1952) 36 Cr.App.R. 125, the acceptance without question of the existence of the three degrees of knowledge referred to by Devlin J. in *Roper* v. *Taylor's Central Garage (Exeter), Ltd.* [1951] 2 T.L.R. 284 at p. 288, the inadequate discussion of the defence of superior orders (p. 64), and the rather feeble acceptance of the views expressed by the Divisional Court in *Ruse* v. *Read* about the basis of the decision in *Riley's* case. The distinction between a taking and a delivery which is mentioned at p. 167 in connection with larceny is not thoroughly worked out in the text later on, as one might have expected,

Omissions noticed in certain parts of the text which might well be rectified in future editions include *R.* v. *Pearce* [1952] 2 All E.R. 718 (at p. 13); *Reynolds* v. *Austin* [1951] 2 K.B. 135; *Gardner* v. *Akeroyd* [1952] 2 Q.B. 743. and *Ferguson* v. *Weaving* [1951] 1 K.B. 814 (at pp. 68–9); *R.* v. *Jones* (1948) 33 Cr.App.R. 11 (in connection with larceny by trick). All these cases are referred to elsewhere in the text than at the pages mentioned. The same cannot be said of *Wilcox* v. *Jeffery* [1951] 1 All E.R. 464, in relation to aiding and abetting; *R.* v. *Osborn* (1919) 84 J.P. 63, in relation to attempts; and *R.* v. *Petch* (1878) 14 Cox 116, in connection with the larceny of wild animals. These cases do not appear at all.

A few small points of criticism: is it true to say that the distinction between felony and misdemeanour has become largely academic? Is the oath sworn in felony and misdemeanour not the same since the Lord Chief Justice's Memorandum of November 1948? Would it not be clearer to explain that it has been the practice to extend the emergency legislation from year to year by statutory instrument, and then give examples in the footnotes, rather than include the confusing and soon out-dated jumble in the text at pp. 19–20? Is not the headnote to Article 25, p. 77, misleading? How could there have been a prosecution for conspiracy on the facts of *R.* v. *Turvey* (1946) 31 Cr.App.R. 154? (Surely the remarks of the Court of Criminal Appeal to that effect must be regarded as having been uttered *per incuriam*.) The statute which created the crime of fraudulent conversion was passed in 1901, not 1900 (p. 169). The suggestion made at p. 218 that the parents in *Walters* v. *Lunt* could have been regarded as having stolen the bicycles from the child, who for this purpose might be treated as an owner under the Larceny Act, is surely rather fanciful. At p. 72, the judge in *R.* v. *Cory Brothers & Co.* should be given as Finlay J. not Findley.

Finally, it may be worth recording that students appear to find the articles on *mens rea* rather difficult going, and there seems no doubt that the book has become much more difficult to study. This may not be a bad thing, but the

authors might see whether anything could be done to make the argument more straightforward and easier to follow.

The new edition of the casebook contains an admirable selection of cases, and is a worthy companion to the textbook, though it can of course be used independently. The method of including, in addition to a brief headnote summarising the point of the case, occasional comments on cases of importance in the form of short notes, has been continued, but the notes are considerably shorter and less general than before, the reason being that much of the material has now been incorporated in the textbook. Cases on evidence are again excluded, which prompts the question whether any useful purpose is served by the inclusion of evidence in the textbook. The space could be used with profit to expand some of the briefer sections and make them more comprehensive, *e.g.*, vicarious liability. The casebook, like the textbook, can be confidently recommended as having a firm claim to the attentions of students and law teachers and the legal profession generally.

J. E. HALL WILLIAMS.

STATUS IN THE COMMON LAW. By R. H. GRAVESON, Professor of Law and Dean of the Faculty of Laws in the University of London. [London: the Athlone Press. 1953. xxiv and 151 pp. 18s. net.]

IN his preface Professor Graveson says that he wrote this book between 1938 and 1940. He had hoped that in the intervening years a more comprehensive treatise on the subject might have appeared. In default, he offers his essay as a starting point for further inquiry into the general nature of status.

It is indeed as well known as it is surprising that status is the Cinderella amongst legal concepts. Little has been written about it either in this country, on the Continent or in America. Professor Graveson is, therefore, warmly to be congratulated for producing this book which undoubtedly constitutes the most serious attempt to grapple with the difficulties and uncertainties surrounding the subject. Inevitably he leaves many questions unanswered, some of his suggestions are hesitant and tentative but the book is as thought-provoking as it is learned and throws much light on a topic on which legal literature is both uninformative and confusing.

The first obstacle to overcome is the definition of the term itself, which is used in a disconcerting number of different senses. Austin said that the definition of status was "the most difficult problem in the whole science of jurisprudence." This sentiment was echoed by Sir Carleton Allen in his inaugural lecture at Oxford in 1930. The author's definition is cautious and very elaborate, but it is doubtful whether it covers all the varieties of status. It also seems unfortunate that he finds it necessary to use the word "normal," even if he does hold that the concept must be confined to narrow and separate classes invested with peculiar rights and capacities. The married woman, accustomed to harsh legal treatment, may forgive him (encouraged perhaps by Lord Dunedin's dictum in *Salvesen* v. *Administrator of Austrian Property* that "celibacy is just as much a status as marriage") but would it not be more elegant and consistent to speak of the status of illegitimacy rather than that of legitimacy? One wonders, moreover, what was the "normal" condition of a man in medieval society with its all-pervading interdependence between status and land tenure.

A more pertinent question is whether Professor Graveson succeeds in isolating the legal idea of status from neighbouring conditions—a task all the more important at a time when the coming of the Welfare State is sometimes said to have brought about a "revival of status." The problem teems with difficulties and the author's analysis is penetrating. Even so, some doubts remain. Clearly not all groups or classes give rise to status. It is fairly

common to refer to the "status" of trustees, solicitors, workmen, factory owners, etc. Professor Graveson offers two tests. A true status is imposed by law and not by agreement between the parties and it cannot be voluntarily relinquished. Yet the *locus standi* before the law of a married woman appears, strictly speaking, to be as much determined by the law as that of a barrister or a factory owner. Furthermore, in *Nachimson* v. *Nachimson* the Court of Appeal adopted the view that the status of husband and wife comes into existence notwithstanding that the *lex loci celebrationis* admits the subsequent dissolution of the marriage by mutual consent or at the will of one party. Any other decision would seem out of touch with reality. The second test proposed by the author is that status is a condition which affects "substantially or generally" a person's rights and capacities. According to this, workmen and other economically weaker groups (Josserand's *les nouveaux faibles*) who in the modern State certainly enjoy a special legal condition, do not have a status. Their condition not only may be ended at will but also is limited in scope. Professor Graveson, however, thinks that the industrial mobilisation during the last two wars resulted in the creation of a true legal status for both workmen and employers in the munitions industry. Nevertheless, it would seem that here as well membership of the class in question did not generally (or even substantially) affect a person's legal rights. We are thus thrown back to the unsatisfactory conclusion that the drawing of the line remains a matter of degree—the new developments remaining outside.

Perhaps the most valuable feature of the book is the emphasis it places on the public law character of status and on the social interest involved in the concept. The present-day movement towards gradual restriction of individual will and liberty may not be a movement in the direction of status as defined by the author. Yet, as Dean Roscoe Pound writes in the Introduction, ". . . status becomes a subject of much general juristic importance with the giving up of the idea of free contract as the prime agency of social control."

J. K. Grodecki.

The Doctrine of the Separation of Powers and its Present-Day Significance. By Arthur T. Vanderbilt. Second Lectures in the Roscoe Pound Lectureship Series. [Lincoln, Nebraska: University of Nebraska Press. 1953. 144 pp. $2.50.]

"On respect for the doctrine of the separation of powers, not as a technical rule of law but as a guide to the sound functioning of government, rests not only the stability of this nation but of every other nation and the freedom not only of our own citizens but of the citizens of every other country. The doctrine must be universal in its application, if stability and liberty are to be sought and obtained." With this challenging generalisation Chief Justice Vanderbilt concludes the last of three lectures delivered in 1952 at the University of Nebraska. What meaning does the lecturer read into a doctrine which has tended to mean all things to all men? Any liberal democrat may agree with Montesquieu and Madison that the concentration of all the functions of government in the hands of one group of persons is incompatible with the existence of a free society, but he may doubt whether formal constitutional prohibitions or elaborate institutional devices are likely to forestall such a development. He may go on to point out that where a version of the doctrine has been written into a constitution it has too often proved to be nothing more than a nuisance, with the result either that the constitutional limitations have been disregarded and the constitution brought into disrepute, or that avoidable friction and dissension between executive and legislature have been generated.

To Chief Justice Vanderbilt the doctrine means, in its broadest sense, that there shall be "a government of limited powers distributed both vertically and horizontally." In his first lecture he examines the doctrine historically and

comparatively; in the second he points to "the dominance of the federal government over the states and of the federal executive over the legislative branch as a threat to the doctrine and to constitutional government"; in the third he condemns "judicial deference" (especially to findings of fact by administrative agencies) as "a grave cause of constitutional imbalance." With the doctrine of the separation of powers he links the theory of the rule of law. The whim of officialdom, or wide executive discretion, is antithetical to the rule of law; the aggrandisement of the executive branch of government does violence to the doctrine of separation of powers; the rule of law and the separation of powers are good things, the aggrandisement of the executive branch is a bad thing. His lectures are, in essence, a sustained attack on the growth of the powers of the federal government over persons and property in the United States. His criticisms are forceful, closely reasoned and fully documented. Those who have intimate knowledge of conditions in the United States may be satisfied that he has scored hits on his target. Yet there are reasons for regretting his decision to present his case in terms of deviations from a constitutional theory.

Chief Justice Vanderbilt does not always discriminate clearly between the separation of powers as a juridical concept and the separation of powers as a principle of political action; and his commendation of the doctrine as a necessary juridical concept fails to carry conviction. In his first lecture he stresses the evils that have befallen countries whose constitutions have not provided for any clear separation of powers between the three branches of government, or have included escape clauses giving wide emergency powers to the executive. But he takes as his examples Russia, Germany, France and the Latin American countries, while ignoring not only the United Kingdom (with its "unwritten" constitution) but also Canada and Australia, which have written federal constitution but which can boast of high achievement in the maintenance of free institutions despite the absence of a constitutional requirement of separation of powers. In the later lectures arguments which most students will associate with versions of the separation of powers theory are intermingled with others which to many people will appear frankly political. It is one thing to say that administrative agencies have been too liberally endowed with adjudicatory and rule-making functions, that judicial review needs to be strengthened and that recent Presidents have improperly encroached upon the powers assigned to Congress; it is another thing to say that the executive branch of government is top-heavy and inefficient, that the administration of regulatory and welfare services is over-centralised and that many functions should be removed from the federal authorities and returned to the states. The lecturer's preoccupation with the misdeeds of the federal executive branch may explain why he has omitted to mention other developments which seem to a foreign observer to offer a more conspicuous menace to democratic freedom. The inquisitorial activities of some congressional committees are in many ways indistinguishable from adjudication. Whether they are or are not consistent with the doctrine of the separation of powers is disputable and, to critics of the doctrine, unimportant. That an enthusiastic proponent of the doctrine should ignore their existence is indeed surprising.

S. A. DE SMITH.

JURISPRUDENCE IN ACTION. (Legal Essays selected by the Association of the Bar of the City of New York Committee on Post Admission Legal Education). [New York: Baker, Voorhis and Co. Inc. 1953. London: Sweet & Maxwell, Ltd. 494 pp. £2 5s.]

"JURISPRUDENCE," it has been said, "stinks in the nostrils of every practising barrister," and while this view is less prevalent today, it is by no means outmoded amongst English lawyers. Americans, fortunately, take a different

view, and this collection of seventeen essays is designed specifically for busy practitioners, immersed in the rough-and-tumble of the courts, who nevertheless wish occasionally to step outside the arena, and refresh themselves by a brief contemplation of the law in its broader aspects and philosophy. Six essays, contributed by Ames, Holmes, Cohen, Hand, Radin and Pound are concerned directly with the philosophy of law: two, by Clark and Goodhart, deal with practical problems; six more, including articles by Cardozo and Macmillan, deal with legal technique: while the remaining three are contributed by those giants of legal history, Holdsworth, Maitland and Vinogradoff. The choice of contributors is significant: all are connected with the historical-realist school of jurisprudence and this confers a unity which might otherwise be lacking. Five American judges have made contributions, while the British Bench is represented by a solitary figure, Lord Macmillan. The shade of Holmes with his "prophecies of what the courts will do," pervades this book, as it does most American legal writing, and presumably has made possible the close connection between jurisprudence and law in action, which is so marked a feature of the American legal system. Clark's career of twenty years at Yale, followed by appointment to the Bench, would be unthinkable in England.

All interested in the future of law in England are concerned today with the gap which has arisen between the social policies of the legislature and the individualist outlook of a Bench and Bar trained in the principles of the common law. Barristers, in constant touch with the law, necessarily concerned with the immediate case and technical questions of pleading, have no time to consider such problems. No surprise need be occasioned by this, but what is regrettable is the lack of sympathy and co-operation with those who are endeavouring, however feebly, to bridge the gap. In this book we read again of the solution proposed by Pound many years ago, and adopted not only at Yale and Harvard but in the law schools throughout the United States: "To my mind the remedy is in our law schools: It is in training the rising generation of lawyers in a social, political, and legal philosophy abreast of our time." English law schools have not adopted such policies, and although the law syllabus has been modified everywhere, in essentials it has remained unchanged since the last century. Yet, today, the numbers reading law at universities have reached a record figure, and of these the percentage of potential lawyers is higher than ever before. The problem is more, not less, acute.

Space allows only for the most random of reflections on selected essays. Goodhart's essay on the *ratio decidendi* has withstood the locust years and still illuminates, although doubtless its author's views have since been modified, and cases like *Jacobs* v. *L. C. C.* [1950] A.C. 361 must now be taken into account. Radin and Cohen range over a wide field, and these two articles are perhaps the most stimulating in the whole book. Curtis in an article on legal interpretation has contributed to the application of linguistic techniques to legal problems, a science still in its infancy. Its "wordiness" and constant repetition, however, make it tedious reading, and one wishes that those engaged in this field would read Cardozo's brilliant article on "Law and Literature," with its emphasis on the unity of form and substance. "Form," wrote Henry James to Hugh Walpole, "alone, takes and holds and preserves substance, saves it from the welter of helpless verbiage that we swim in as a sea of tasteless tepid pudding." No one who heard the recent lecture at University College, London, by Mr. Justice Devlin on "Criminal Responsibility," can doubt the truth of this: the impact of ideas depends as much on form as on substance. A fair general criticism of these essays and indeed of all American critical writing is precisely this turgid lack of form. Ugly Germanic adjectives combined with too frequent use of the dictaphone have accentuated this American blemish, but our own linguistic legal experts should be on their guard. There is grave danger that the tradition will be exported and established on this side of the Atlantic.

St. John-Stevas.

DER SCHULDBEGRIFF IM ENGLISCHEN UND NORDAMERIKANISCHEN STRAFRECHT. By ALFRED R. TIDOW. [1952. xii and 183 pp.]

VORLEBEN UND VORSTRAFEN DES ANGEKLAGTEN ALS INDIZIEN IM ENGLISCHEN STRAFPROZESS. By HEINZ BRANGSCH. [1953. vi and 121 pp.] (Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Neue Folge 5 and 8.) [Bonn : Ludwig Röhrscheid.]

IN the first of these two monographs in comparative law which are published with the support of the *Gesellschaft fuer Rechtsvergleichung*, Dr. Tidow examines the place of the mental element in criminal responsibility under English and U.S. law, chiefly for the benefit of lawyers unfamiliar with the common law systems. In explaining the prevailing uncertainty concerning the exact meaning of *mens rea* he stresses the reluctance of English lawyers to enter into abstract discussions of principle and the predominantly empiric character of their approach. Unfortunately, in this particular instance the validity of his argument is somewhat weakened by the fact that he is obviously unacquainted with major studies attempting to clarify this very point, notably the important contribution to *A Modern Approach to the Criminal Law*. The author, not unjustifiably, comes to the conclusion that there are still numerous difficulties and contradictions in terminology and definition to be settled and that no "scientifically based" doctrine of criminal liability has yet been worked out here. His exposition, which contains references to the attitude of German law to the questions discussed, leads him nonetheless to the conclusion that even the absence of systematic treatment of general topics of this kind has not prevented the law of this country and of the United States from following a reasonably coherent policy and that its results do not differ radically from the attitude of German criminal law to the problem of guilt.

Dr. H. Brangsch tackles with great courage one of the thorniest parts of the English law of evidence, the admissibility of evidence of similar acts and character in criminal proceedings, and the attempt is the more commendable since German codes know no corresponding provisions in the law of proof at all. His study, written as a doctorate thesis but considerably expanded, is more than a mere exposition of a topic unfamiliar to German readers whose interest may have been aroused by the trials conducted before British and U.S. Military courts in recent years. Based on careful consideration of the relevant statutes and almost 200 decided cases, it deserves attention as an original contribution to any discussion of this complicated subject.

Although the author, working abroad, has not had available to him all the material relevant to his survey of the development and present state of the rules of evidence concerning evil propensity (he appears to have had no access, for instance, to a complete set of the *Criminal Appeal Reports* or to important periodicals such as the *Harvard Law Review*, and has not been able to consult the big Phipson or a recent edition of Stephen) his conclusions are soundly argued and always deserve attention, even if they are not invariably acceptable. Admissibility of similar act evidence is in several sections classified according to the particular crime charged against the accused, but even this approach —though open to obvious objections—has its suggestive value. It brings out Dr. Brangsch's belief that the development of this whole branch of the law has been influenced to some extent by the dangerous prevalence of certain crimes such as counterfeiting and arson (rick-burning) early in the last century, and it might well be maintained that a similar stimulus towards a less restrictive interpretation of the rule of non-admissibility has in our own day been given by the obvious determination of the courts to deal effectively with serious sexual offenders.

H. A. HAMMELMANN.

EXPROPRIATION IN INTERNATIONAL LAW. By S. FRIEDMAN. [London: Stevens & Sons, Ltd. 1953. xv and 236 pp. £1 15s.]

THIS is the English translation of a study which appeared in the year 1950 in French in *L'Égypte Contémporaine* and which has been revised and brought up to date.

As distinct from other books on confiscation which have recently appeared the present work is confined to international law in the strict sense of the term. Even so there is a wide gap to be filled. It is by no means certain whether the author has made a really substantial contribution to solving what he recognises as "a most pressing problem." The reason probably lies in the fact that he takes a view of international law and international legal precedent which may perhaps be characterised as somewhat uninspired.

After a review of expropriation in State practice (Chapter 2) Dr. Friedman explains in Chapters 3 and 4 that international law, being "devoid of an economic content," allows States complete freedom in the matter of confiscation and that, in particular, "neither international judicial decisions nor international treaty practice nor legal principles provide any evidence of a restrictive rule" (pp. 134, 135). The only limitations arise from treaties and from such rules of customary international law as those relating to jurisdiction, immunity and non-discrimination. In connection with general expropriation there is no rule requiring the payment of compensation to foreign owners, but in the case of individual expropriation the principle of non-discrimination involves the duty to pay compensation, though *restitutio in integrum* cannot be demanded because this would "constitute an intolerable interference in the internal sovereignty of States" (p. 214). The conclusion is (p. 222):

> that measures carried out within a State command the respect of all other States, except in so far as the effects of such measures go beyond the limits of State jurisdiction under international law. Were it otherwise, in a field in which States vigorously affirm that the system and organisation of property forming part of the national heritage are entirely their exclusive concern, international law and even the very existence of the international community would be gravely endangered. Only on the principle of respect for the independence of States irrespective of their form of government can the international community develop. In these circumstances it is for statesmen to seek, by means of patient negotiation, to mitigate individual sufferings which, though sometimes inevitable, are nevertheless deserving of pity, and thus contribute to the development of a chapter of international law in which there still exist numerous causes of friction and misunderstanding.

A passage such as this makes it clear that even after the publication of Dr. Friedman's work the need for a comprehensive and scholarly treatise on the subject remains. Yet this is a book which is by no means without value, even if for no other reason than the collection of material and the convenient restatement of largely familiar views.

F. A. MANN.